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20192

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 489.

ELLIS S. PEPPER, RECEIVER OF THE PYNCHON NATIONAL BANK, APPELLANT,

vs.

SPRINGFIELD INSTITUTION FOR SAVINGS, SPRINGFIELD FIVE CENT SAVINGS BANK, AND HAMPDEN SAVINGS BANK.

No. 490.

SPRINGFIELD INSTITUTION FOR SAVINGS, SPRINGFIELD FIVE CENT SAVINGS BANK, AND HAMPDEN SAVINGS BANK, APPELLANTS,

vs.

ELLIS S. PEPPER, RECEIVER OF THE PYNCHON NATIONAL BANK.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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1 United States Circuit Court of Appeals for the First Circuit, October Term, 1913.

No. 1080.

ELLIS S. PEPPER, Receiver, Appellant,
v.
SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellees.

No. 1081.

SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellants,
v.
ELLIS S. PEPPER, Receiver, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of March, being the seventeenth day of March, in the year of our Lord one thousand nine hundred and fourteen.

Before the Honorable James M. Morton, Jr., District Judge.

No. 50, Equity Docket.

(No. 336, C. C.)

ELLIS S. PEPPER, Receiver, Complainant,
v.
C. JENNIE ALLEN et al., Defendants.

2 *Cross-bill of Complaint.*

THE SPRINGFIELD INSTITUTION FOR SAVINGS, THE SPRINGFIELD Five Cents Savings Bank, and the Hampden Savings Bank, Complainants,
v.
ELLIS S. PEPPER, Receiver, Defendant.

And now, to wit, June 3, 1914, the following Decrees are entered:

Final Decree on Original Bill against Defendants, the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank.

June 3, 1914.

BINGHAM, *J.:*

This cause came on to be heard against said savings banks at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the report of the master be confirmed.
2. That the defendants are not indebted to the plaintiff for or on account of any of the matters and things set forth in the bill of complaint, and that the bill be dismissed as against them with costs to be taxed, and that execution issue therefor in common form.

By the Court,

CHARLES K. DARLING, *Clerk.*

Final Decree on Cross-bill of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank.

June 3, 1914.

BINGHAM, *J.:*

This cause came on to be heard against said savings banks at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

3 1. That the report of the master be confirmed.

2. That the defendant is not indebted to the plaintiffs for or on account of any of the matters and things set forth in the bill of complaint, and that the bill be dismissed as against him without costs to either party.

By the Court,

CHARLES K. DARLING, *Clerk.*

From the foregoing final decrees, Ellis S. Pepper, receiver, claims appeals as a complainant and as a cross-defendant to the United States Circuit Court of Appeals for the First Circuit, and the above-mentioned savings banks appeal as defendants and cross-complainants to said court, and bonds on appeal having been waived, said appeals are allowed accordingly.

Pursuant to Equity Rule 77, the following agreed statement was filed on the third day of June, A. D. 1914.

Statement of Case and Waiver of Bonds on Appeal.

The first proceeding is a bill in equity brought by the receiver of the Pynchon National Bank of Springfield against the stockholders of the bank to recover an assessment of $49 a share ordered by the comptroller of the currency on December 28, 1906. The second proceeding is a cross-bill brought by the Springfield Institution for Savings, the Springfield Five Cents Savings Bank and the Hampden Savings Bank, stockholders of the Pynchon National Bank, in which they allege in substance that the comptroller of the currency on March 18, 1902, made an assessment of $100 a share upon the stockholders of the bank; that the savings banks, as stockholders, paid to the receiver thereon the sum of $82 a share for every share of the stock owned by them; that the subsequent assessment of $49 a share was invalid; and that if it was not invalid and the previous assessment was legally withdrawn, the sums paid by them should be ap-

plied in satisfaction of the assessment of $49 a share on their respective holdings, and the balance returned to them.

4 The case was referred to F. Rockwood Hall, Esquire, as master.

At the hearing before the master the parties entered into a stipulation that their rights and equities in the subject-matter of the suits should be fixed and determined by the final decrees therein, waiving all questions of pleading and form of procedure, and whereby they submitted as evidence an agreed statement of facts stipulating that the court might draw such inferences of fact from those agreed upon as might be warranted. The parties also introduced evidence of a documentary nature.

The master found the facts to be as stated in the stipulation and so reported, making the stipulation and the exhibits a part of his report. Neither party took exceptions to the master's report.

On the thirty-first day of March, 1914, the causes were heard by the District Court on the master's report.

The master's report, the requests of both parties for rulings and findings and the opinion of the District Court entered on the tenth day of April, 1914, are made a part of this statement.

On the third day of June, 1914, the District Court entered in the original bill a final decree dismissing it as to the savings banks with costs to the defendant, and a final decree in the cross-bill dismissing it without costs to either party.

The plaintiff in the original suit appealed from the final decree therein and said savings banks waived notice thereof and of a bond to prosecute said appeal and answer for costs. Each of the defendants also appealed from said decree and the plaintiff also waived notice thereof and of such bond.

The said savings banks appealed from said final decree in the cross-bill and the defendant therein waived notice thereof and of any bond to prosecute said appeal and answer for costs.

The questions presented by the appeals are set forth in the assignments of errors filed by the parties respectively, which are also made a part of this statement.

BOYD B. JONES,
Solicitor for said Banks.
CHARLES G. GARDNER,
Solicitor for Plaintiff in Original Bill and Defendant in Cross-bill.

5 *Master's Report.*

[Filed January 22, 1914.]

Pursuant to the order of the court which, with the clerk's certificate as to the docket entry regarding the same, is hereto annexed, the parties above named duly came before me for a hearing, and introduced a stipulation signed by them containing an agreed statement of facts, with the reservation that all questions as to the admissibility in evidence of any of the facts may be raised at the hearing

before the District Court, excepting that formal proof of any of such facts will not be required. This stipulation is hereto annexed (marked "A"), and made a part of this report.

The parties also introduced in evidence the following:

1. Check of the Springfield Five Cents Savings Bank for $9,820, dated June 14th, 1902, payable to the order of R. W. Ellis, Trustee, endorsed by R. W. Ellis, Trustee, and by The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, receiver (marked "Exhibit 1").

2. Check of the Springfield Institution for Savings for $30,360.17, dated June 14, 1902, payable to the order of Ralph W. Ellis, Trustee, endorsed by Ralph W. Ellis, Trustee, and by The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, receiver (marked "Exhibit 2").

3. Check of the Hampden Savings Bank for $5,319.17, dated June 14, 1902, payable to the order of Ralph W. Ellis, Trustee, endorsed by Ralph W. Ellis, Trustee, and by The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, receiver (marked "Exhibit 3").

4. Certified copy of a vote under date of April 26, 1902, of the Board of Investment of the Hampden Savings Bank (marked "Exhibit 4").

5. Certified copy of a vote under date of May 7, 1902, of the Board of Trustees of the Springfield Institution for Savings (marked "Exhibit 5").

6. Certified copy of a charge on the cash book of the Springfield Institution for Savings under date of June 30, 1902, relating
6 to the matter referred to in the above vote of May 7, 1902 (marked "Exhibit 6").

The above six exhibits were introduced in evidence subject to the right of either party to object to the same at the hearing in the District Court. They are annexed to, and made a part of, this report.

The only evidence introduced before me was the stipulation of the parties and the six exhibits above referred to.

I find the facts to be as stated in said stipulation, and I so report.

Upon the completion of my report copies thereof were furnished to the respective counsel, who, upon examining the same, notified me that they waived further hearings on the report, and made no objections, and took no exceptions, thereto. Whereupon this report is respectfully submitted.

F. ROCKWOOD HALL, *Master.*

Boston, Mass., January 15, 1914.

District Court of the United States, District of Massachusetts. In Equity.

No. 50 (C. C. 336).

ELLIS S. PEPPER, Receiver,
v.
C. JENNIE ALLEN et al.

Bill in Equity.

THE SPRINGFIELD INSTITUTION FOR SAVINGS, THE SPRINGFIELD FIVE CENTS SAVINGS BANK, THE HAMPDEN SAVINGS BANK
v.
ELLIS S. PEPPER, Receiver.

Cross Bill in Equity.

Motion for Reference to a Master.

(Filed January 22, 1913.)

And now come the aforesaid Savings Banks and the said Ellis S. Pepper and ask that the matters of account between them in
7 the above entitled suits and all issues of fact in relation thereto be referred to F. Rockwood Hall, Esquire, of Boston, Massachusetts, as master to hear the parties and their evidence and to find and report the facts to the court.

BOYD B. JONES,
Solicitor for said Banks.
C. G. GARDNER,
Solicitor for Elias S. Pepper.

January 22, 1913.

COLT, *J.*:

Motion allowed; ordered that the cause, as herein prayed for, be referred to F. Rockwood Hall, esq., as master.

Attest:
CHARLES K. DARLING, *Clerk,*
By JOHN E. GILMAN, JR.,
Deputy Clerk.

A true copy:

Attest:
[SEAL.] CHARLES K. DARLING, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the District Court of the United States for the District of Massachusetts, certify that it appears of record that on the twenty-second day of January, A. D. 1913, the following entry in re motion for reference to a master was made on the docket in the cause in equity entitled No. 50 (C. C. 336), Ellis S. Pepper, Receiver, Complainant, v. C. Jennie Allen et al., Defendants, now pending in said District Court:

"COLT, *J.*: Motion allowed; ordered that the cause as prayed for in the motion be referred to F. Rockwood Hall, Esq., as master."

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this seventeenth day of December, A. D. 1913.

[SEAL.] CHARLES K. DARLING, *Clerk.*

8 "A."

District Court of the United States, District of Massachusetts.

In Equity.

ELLIS S. PEPPER, Receiver,
v.
C. JENNIE ALLEN et al.

THE SPRINGFIELD INSTITUTION FOR SAVINGS et al.
v.
ELLIS S. PEPPER, Receiver.

Cross Bill.

Stipulation of Parties.

It is agreed by the parties in the above entitled cross bill that the liabilities, rights and equities of said parties in and by reason of the matters herein and in the pleadings in the above entitled causes may be fixed and determined by the final decrees in the above entitled original bill and cross bill, and to that end said parties waive all questions of pleading and form of procedure, reserving, however, fully, the right of said parties by appeal, writ of error or otherwise, to have reviewed the final decision, judgments and decrees in said causes.

The said parties further agree to submit as the evidence at the hearing of said causes by the Court the following statement of facts, the Court to have the power to draw such inference of fact therefrom as may be competent under the rules of evidence. The said parties,

however, do not waive the right to object to any part of said statement on the ground that said facts if proven are incompetent, immaterial or irrelevant, and each party reserves the right to offer additional evidence if it shall seem to him or them requisite or desirable.

Statement of Evidence.

"The Pynchon National Bank of Springfield" is and was at the time of the matters and things set forth in the pleadings in said causes a National Banking Association duly organized under the laws of the United States of America and having its usual
9 place of business in Springfield, in said Commonwealth. It has and then had an authorized capital of Two Hundred Thousand Dollars ($200,000) divided into two thousand (2,000) shares of the par value of One Hundred Dollars ($100) each, all of which had been issued at par and were outstanding at the date of the appointment of said Pepper as Receiver thereof. On the twenty-fourth day of June, 1901, the Comptroller of the Currency of the United States determined that said Bank was then insolvent and appointed the said Pepper Receiver thereof as provided by the laws of the United States. The said Pepper duly qualified as such Receiver and upon said twenty-fourth day of June, 1901, he was and ever since said date has been the duly appointed, qualified and acting Receiver of said Bank.

"The Springfield Institution for Savings" incorporated as a Savings Bank under the laws of the Commonwealth of Massachusetts was upon said twenty-fourth day of June, 1901, the holder and owner of three hundred and seventy-one (371) shares of said capital stock.

"The Springfield Five Cents Savings Bank" and "The Hampden Savings Bank" incorporated in like manner held upon said date respectively one hundred and twenty (120) shares and sixty-five (65) shares of said capital stock. These Savings Banks are, and then were, subject to the provisions of Chapter 116 of the Public Statutes, and Chapter 113 of the Revised Laws of Massachusetts.

On the eighteenth day of March, 1902, the Comptroller of the Currency made an assessment and requisition upon the shareholders of said Pynchon National Bank of Two Hundred Thousand Dollars ($200,000), that is to say, of One Hundred Dollars ($100) upon each and every share, to enforce their individual liability as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States. Said assessment was by its terms payable on or before May 15, 1902.

On the tenth day of April, 1902, the Comptroller sent to the directors of said National Bank a letter, of which the following is a copy:

10 "The Board of Directors, Pynchon National Bank, Springfield, Mass.

GENTLEMEN: In view of the effort now being made by the directors and stockholders of the Pynchon National Bank of Springfield,

Mass. (insolvent) to dispose of to the stockholders a large number of the first mortgage bonds of the American Writing Paper Co., I wish to say to your Board that this will effect a settlement of the affairs of this Bank that will be eminently satisfactory to all interests, and one which I am very hopeful will be accomplished.

I am just in receipt of the report of the special examination of this trust made by an official of this Department sent to Springfield for that purpose, and I am quite satisfied if this sale of bonds is effected the Receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.

I wish further to say that after this examination it is very plain that there will be no escape from an assessment of 100 per cent against the stockholders, if the Receiver had to put the Writing Paper bonds on the market at 65 or thereabouts.

The Receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95) the trust will pay out in full and I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen,—which of course is highly improbable.

I trust that you gentlemen will use every possible effort to effect this most satisfactory settlement of these matters.

Respectfully,

WM. B. RIDGELY, *Comptroller.*"

This letter was written by the Comptroller in good faith and with the expectation that it would be and it was shown to the shareholders including said Savings Banks. At the date of said letter, and at the time when said Pynchon National Bank was declared to be insolvent as aforesaid, the assets of the Bank in the hands of the Receiver included bonds of the American Writing Paper Company of the par value of Five Hundred Seventy-seven Thousand Dollars ($577,000). These bonds had been purchased by said Pynchon National Bank prior to the appointment of said Pepper as Receiver as aforesaid for the sum of Five Hundred Twenty-nine Thousand One Hundred and Fifty Dollars ($529,150). They were of the par value of $1,000 each bond.

11 Said letter of the Comptroller of the Currency addressed to the Board of Directors related to an effort then being made by the Directors, Stockholders and the Receiver to procure the purchase from the Receiver of said American Writing Paper Company bonds at the price at which they had been bought by the Bank. Said Directors and the Receiver were then of the opinion that if said purchase upon said terms could be effected it would provide sufficient funds to enable the Receiver of said Bank to pay its debts in full, thereby obviating the necessity for the payment of said assessment or the enforcement of any personal liability whatsoever on the part of the stockholders.

The purchase of these bonds at the price of $950 a bond was consummated under an arrangement entered into by the Receiver, with the knowledge and approval of the Comptroller, whereby the stock-

holders of the National Bank, generally, were each to take, at the price of $950, three (3) bonds for every ten (10) shares of the stock of said Bank owned by them respectively.

Inasmuch as it was ultra vires of Savings Banks under the statutes of the Commonwealth as the Receiver and Comptroller at the time well knew, to purchase such bonds as an investment, it was arranged with the knowledge and approval of the comptroller and the Receiver that the Savings Banks in question instead of purchasing their proportion of the bonds should pay the difference between their then market value and what the National Bank paid for them.

The proportion of the bonds which would have been taken by the Savings Banks if they had become purchasers under the aforesaid arrangement was by agreement between the Receiver and the other stockholders sold by the latter at the then market value and the proceeds of such sales paid to the Receiver so that the Receiver retained none of said bonds.

The Savings Banks did not purchase any of the bonds, nor did they receive any consideration or anything of value for their contributions, which they however made with the expectation and hope that the Bank would thereby be made solvent and that their liability as stockholders for its indebtedness would thereby be extinguished.

12 The contributions thus made by them were Thirty Thousand Three Hundred Sixty and 17/100 Dollars ($30,360.17) by the Springfield Institution for Savings as owner of 371 shares of the stock of said National Bank, Nine Thousand Eight Hundred Twenty Dollars ($9,820) by the Springfield Five Cents Savings Bank as owner of 120 shares of said stock, Five Thousand Three Hundred Nineteen and 16/100 Dollars ($5,319.16) by the Hampden Savings Bank as owner of 65 shares of said stock. These payments amounted to $82 per share of their said holdings. The contributions were made by checks payable to one Ellis, who represented the stockholders in carrying out the arrangements with the Receiver. These contributions of the Banks were made on June 14, 1902, by checks payable to Ellis or order, which he at that date endorsed over to the Receiver.

The Receiver and the Comptroller at the time the former took the checks knew the capacity in which Ellis acted and that the checks were given for the purposes and under the circumstances aforesaid and without any agreement or obligation on the part of the Comptroller or Receiver that the payments thereby made should in whole or in part discharge the liability of the Savings Banks for or on account of the indebtedness of the National Bank and any stock assessments, excepting so far, if at all, as such agreement or obligation may be lawfully implied from the facts stated in this Stipulation and such evidence as may be introduced. The Receiver denies that any such implication is warranted.

The Receiver, with the knowledge and approval of the Comptroller, retained these contributions and applied them toward the payment of the debts of the Bank. The amount which the Receiver thus obtained from the assets of the Bank, the sales of the bonds

and from these contributions were sufficient to pay 98% of the principal of the Bank's indebtedness.

On July 22, 1902, the Receiver wrote to the shareholders of said National Banks, under the instructions of the Comptroller, as follows:—

"Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptrol-
13 ler has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary."

On the twenty-eighth day of December, 1906, the Comptroller of the Currency decided that to pay such interest and expenses of the Bank in full it was necessary to enforce the personal liability of the shareholders as provided by the statutes of the United States, and for that purpose made an assessment and requisition upon the shareholders of said Bank for Ninety-eight Thousand Dollars ($98,000), that is to say, for Forty-nine Dollars ($49) on each of said shares payable on or before the twenty-sixth day of January, 1907, and directed said Receiver to take the necessary steps to collect the same. No attempt has been made by the Receiver to enforce or collect the original assessments of March 18, 1902.

The original bill of complaint is brought to enforce payment of the second assessment. The cross bill is brought to have amounts received from the Savings Banks respectively applied to the payment of the assessment of their shares and the balance returned to them.

GARDNER & GARDNER,
Att'ys for Receiver.
BOYD B. JONES,
Att'y for said Savings Banks.

EXHIBIT 1.

Payable if desired at Chase Nat. Bank New York.

No. 6329.

SPRINGFIELD, MASS., Jun- 14, 1902.

The Springfield Five Cents Savings Bank.

Pay to the order of R. W. Ellis Trustee $9820.00.
Ninety eight hundred and twenty dollars.
To the Springfield National Bank, Springfield, Mass.

HENRY D. MARSH,
Ass't Treasurer.

[Endorsed:] R. W. Ellis, Trustee. The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r.

14 EXHIBIT 2.

Payable if desired at The National Bank of Redemption, Boston, Mass.

Springfield Institution for Savings.

$30,360.17. SPRINGFIELD, MASS., June 14, 1902.

The Chicopee National Bank of Springfield, Mass.

Pay to the order of Ralph W. Ellis Trustee
Thirty thousand three hundred sixty & 17/100 Dollars.

No. 21223.

JOSEPH C. BOOTH, *Treasurer.*

[Stamped on face:] The Chicopee Nat'l Bank, Springfield, Mass. Paid Jun- 19, 1902.

[Endorsed:] Ralph W. Ellis, Trustee The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r. Pay to The Nat'l Exchange Bank, of Boston, Mass. or Order, Springfield National Bank, Springfield, Mass. Ralph P. Alden, Cashier. All Endorsements Guaranteed. Paying Teller, Boston. Jun- 18, 1902. Nat'l Bank of Redemption. Paid through Clearing House, Jun- 18, 1902. Nat'l Exchange Bank, Boston. C. A. Price, Cashier.

EXHIBIT 3.

Hampden Savings Bank.

$5,319.17. SPRINGFIELD, MASS., June 14, 1902.

Agawam National Bank of Springfield.

Pay to the order of Ralph W. Ellis, Trustee,
Fifty three hundred nineteen 17/100 Dollars.
No. 7630.

E. S. BAILEY, *Treasurer.*

[Stampel on face:] Paid June 17, 1902, The Agawam National Bank, Springfield, Mass.

15 [Endorsed:] Ralph W. Ellis, Trustee, The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r. Pay only through the Springfield Clearing House. June 17, 1902. To The Springfield Nat'l Bank, Ralph P. Alden, Cashier.

EXHIBIT 4.

The Hampden Savings Bank,
Springfield, Massachusetts.

Dwight O. Gilmore, President.
John B. Phelps, Treasurer.

At a meeting of the Board of Investment of the Hampden Savings Bank, held April 26, 1902, the following vote was taken:—
"A proposition from Pynchon Bank Directors for us to pay difference between 70 & 95, 25% on 19,000 American Writing Paper Bonds in lieu of an assessment of 100% (4,750 instead of 6,500) was referred to F. H. Stebbins with power."

P. S. BAILEY, *Clerk.*

Approved by F. H. S.

I hereby certify that the foregoing is a true copy of the record of a vote of the Investment Committee of the Hampden Savings Bank passed on April 26, 1902.

JOHN B. PHELPS,
Clerk of Investment Committee.

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

January 10, 1914.

Then personally appeared the above named John B. Phelps and made oath that the foregoing affidavit by him subscribed is true before me,

[SEAL.] FRANK E. CARPENTER,
Notary Public.

16 EXHIBIT 5.

Springfield Institution for Savings, Incorporated 1827.

Winford N. Caldwell, President.
A. A. Packard, Vice-President.
John W. B. Brand, Treasurer.
Joseph E. Holmes, Ass't Treasure-.

Springfield, Mass.

At a special meeting of the Board of Trustees of the Springfield Institution for Savings held May 7, 1902, it was voted:
That the Board of Investment be authorized to enter into an agreement with the receiver and directors of the Pynchon National Bank with a view to the adjustment of the relations of this Institu-

tion to that Bank, and to the discharge of its liability as a stock holder of the Bank, in such form as to them shall seem best.

A true copy.

Attest:

[SEAL.] JOHN W. B. BRAND, *Treasurer.*

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

SPRINGFIELD, MASS., January 10th, 1914.

Then personally appeared John W. B. Brand, Treasurer of Springfield Institution for Savings, and made oath that the above is a true copy of a vote of the Board of Trustees of said Institution as appears by the official records of said meeting, before me.

[SEAL.] W. MEREDITH WHARFIELD,
Notary Public.

EXHIBIT 6.

Springfield Institution for Savings, Incorporated 1827.

Winford N. Caldwell, President.
A. A. Packard, Vice-President.
Joseph Shattuck, Jr., Treasurer.
John W. B. Brand, Ass't Treasurer.

Springfield, Mass.

Profit and loss.—Paid Ralph W. Ellis, Trustee, to be turned over to Receiver of the Pynchon National Bank, that we may, as is
17 believed probable, thereby avoid assessment of 100% on 371 shares Pynchon National Bank Stock (See vote Trustees May 7),
$30,360.17.

I hereby certify that the foregoing is a true copy of the charge made on the cash book of the Springfield Institution for Savings June 30, 1902.

JOHN W. B. BRAND,
Ass't Treas.

March 22, 1909.

Rulings and Findings Requested by the Springfield Institution for Savings et al., Defendants in Original Bill and Plaintiffs in Cross-bill.

[Filed March 31, 1914.]

1. The assessment of $49 which the plaintiff sues to recover is invalid because the first assessment was lawfully levied, and could not lawfully be withdrawn or suspended until the national bank became solvent.

2. The national bank has not been restored to a solvent condition.

3. This suit is not brought to recover the first assessment, and could not be maintained.

If the first ruling requested is denied, then:—

4. The payments made by the savings banks to the receiver were gifts of money and ultra vires the savings banks.

5. Inasmuch as the ultra vires character of the gifts was known to the comptroller and the receiver at the time the checks were transferred to the receiver, the savings banks are respectively entitled to the amounts thereof in excess of the assessment of $49 a share.

6. Each of the savings banks is entitled to recover interest on the amount due it by reason of said gifts.

Peabody v. New York, N. H. & H. R. R. Co., 187 Mass., 489;
Allen v. Fairbanks, 45 Fed., 445.

7. It is competent for the court to find the savings banks
18 entitled by way of damages to interest between the date of the gifts and the date of filing the cross-bill.

8. Each of the savings banks is entitled to recover interest at the legal rate on the amount due it from the date the cross-bill was filed to the date of the filing of the decree.

9. Each of the savings banks is entitled to recover the full amount of the gift paid to the receiver.

10. It is competent for the court to find on the master's report that each of the savings banks is entitled to recover the amount of the gift made by it with interest thereon from the date of the gift.

WILLIAM H. BROOKS.
BOYD B. JONES.

Rulings and Findings Requested by the Plaintiff in the Original Bill and the Defendant in the Cross-bill.

[Filed April 2, 1914.]

1. Upon all the evidence the receiver is entitled to recover from the savings banks forty-nine dollars ($49) per share upon the shares of stock held by them respectively, together with interest from January 26, 1907.

2. The receiver is entitled to collect from the savings banks the assessment of forty-nine dollars ($49) per share unless the same has been paid, or unless excepting for said assessment the savings banks would be entitled to recover from the receiver the amounts paid by them in connection with the plan for the purchase from the receiver of the American Writing Paper Company bonds.

3. There is no evidence upon which it is competent for the court to find that any part of the forty-nine per cent assessment now sought to be recovered has been paid.

4. There is no evidence warranting the finding that but for the assessment now sought to be recovered the savings banks would be

entitled to recover from the receiver the amounts paid by them in connection with the bond transaction.

5. The fact that an assessment of one hundred per cent
19 (100%) was made and withdrawn affords no defense to the enforcement of the forty-nine per cent assessment.

6. Under the circumstances set forth it was competent and proper for the comptroller to withdraw said assessment of one hundred per cent (100%) in the manner adopted by him, and his right to levy and enforce the assessment of forty-nine per cent (49%) is in no wise impaired or affected thereby.

7. There is no sufficient evidence upon which it is competent for the court to find that the amounts paid by the savings banks in connection with the bond plan were gifts, or in the nature of gifts.

8. All the evidence relating to the bond transaction and the payment made by the savings banks in connection therewith was incompetent, irrelevant and immaterial, and should have been excluded by the master.

9. The evidence of the votes passed by the savings banks and the entries made on their books, respectively, was incompetent, irrelevant and immaterial, and should have been excluded by the master.

10. There is no sufficient evidence to warrant the finding that there was any agreement or obligation on the part of the comptroller or receiver that the payments made by the savings banks, respectively, in connection with the bond transaction should in whole or in part discharge their liability for or on account of the indebtedness of the national bank and any stock assessments against them as shareholders.

11. Even if it should be found that there was such agreement, understanding or obligation (referred to in request 10), the same does not in any way affect the liability of the savings banks as defendants under the original bill.

12. The fact that the comptroller stated in his letter of April 10, 1902 (stipulation, p. 4), that "I do not hesitate to say there will — no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen—which of course is highly improbable," and that it does not appear that any unlooked for shrinkage in value of assets has subsequently occurred does not impair, or in any way affect, the right of the receiver
20 to enforce the payment of the assessment of forty-nine per cent (49%) as the decision of the comptroller as to the necessity of an assessment and the amount thereof is conclusive.

13. Under the circumstances it would not have been ultra vires of the savings banks to have purchased their proportion of the bonds to be taken by the stockholders in the plan described in the stipulation.

14. If it would have been within the powers of the savings banks under the circumstances disclosed to have purchased their proportion of the bonds or any number thereof, they acted no less within their powers by contributing to the plan the difference between the market value and the purchase price to the national bank to save

themselves from a threatened loss growing out of a legitimate banking transaction.

15. It is competent and warranted by the evidence for the court to find that what the savings banks did under the circumstances in connection with the bond plan would have been done by any prudent, natural person for the purpose of protecting his own interests and, therefore, was not ultra vires.

16. Whether or not what the banks did was in fact ultra vires, the transaction was fully executed and completed before the bringing of the cross-bill and the savings banks are accordingly entitled to no relief thereunder.

17. Even if the savings banks would, under any circumstances, have been entitled to relief under the original or cross-bill, they are now precluded therefrom by laches.

18. The stockholders other than the savings banks entered into and carried out the plan relating to the purchase of the bonds in the belief that the savings banks were bearing their proportionate share of the expense of restoring the national bank to a condition of solvency, and when they paid in their money it was with the understanding and belief that the national bank would receive the benefit accruing from the sale of all of the bonds at nine hundred and fifty dollars ($950) each.

19. It would not be in accordance with the principles of equity and good conscience to permit the savings banks to recover
21 the whole or any part of the sums paid by them in connection with the bond transaction at the expense of the other stockholders.

20. There was good and sufficient consideration moving from the receiver and the other shareholders for the payment by the savings banks of the amounts paid by them in connection with the bond transaction.

21. If the court should find that the savings banks are entitled to recover the amounts paid by them in connection with the bond transaction, or any part thereof, they are not entitled to interest thereon.

22. In the view most favorable to the savings banks they are at least in pari delicto with the receiver and comptroller, and inasmuch as the sums paid by them in connection with the bond transaction have been in good faith paid to the creditors of the national bank, and if the savings banks are entitled to recover them an additional assessment must be collected from all the stockholders of the national bank, it is not in accordance with equity and good conscience that any interest should be paid.

GARDNER & GARDNER,
Solicitors for the Receiver.

Opinion of the Court.

April 10, 1914.

BINGHAM, *J.*: The first proceeding is a bill in equity brought by the receiver of the Pynchon National Bank of Springfield against

the stockholders of the bank to recover an assessment of $49 a share ordered by the comptroller of the currency on December 28, 1906. The second proceeding is a cross-bill brought by the Springfield Institution for Savings, the Springfield Five Cents Savings Bank and the Hampden Savings Bank, stockholders of the Pynchon National Bank, in which they allege in substance that the comptroller of the currency on March 18, 1902, made an assessment of $100 a share upon the stockholders of the bank; that the savings banks, as stockholders, paid to the receiver thereon the sum of $82 a share for every share of the stock owned by them; that the subsequent assessment of $49 a share was invalid; and that if it was not in-
22 valid and the previous assessment was legally withdrawn, the sums paid by them should be applied in satisfaction of the assessment of $49 a share on their respective holdings, and the balance returned to them.

The questions raised in these proceedings are now submitted upon an agreed statement of facts, in which it is stipulated that the court may draw such inferences of fact from those agreed upon as may be warranted.

The Pynchon National Bank is a national banking association duly organized under the laws of the United States, with its place of business at Springfield, Massachusetts. Its authorized capital is $200,000, divided into 2000 shares of the par value of $100 each. All of its shares had been issued and were outstanding at the time of the occurrence of the matters here in controversy.

The Springfield Institution for Savings, the Springfield Five Cents Savings Bank and the Hampden Savings Bank are saving institutions organized under the laws of Massachusetts, and on June 24, 1901, owned, respectively, 371, 120 and 65 shares of the capital stock of the Pynchon National Bank. These savings banks are all subject to the provisions of Chapter 116 of the Public Statutes and Chapter 113 of the Revised Laws of Massachusetts.

June 24, 1901, the comptroller of the currency adjudged the Pynchon National Bank insolvent, and appointed Ellis S. Pepper as its receiver. Pepper at once qualified, and has ever since acted as receiver.

March 18, 1902, the comptroller, acting in pursuance of Sections 5151 and 5234 of the Revised Statutes of the United States, made an assessment and requisition upon the stockholders of the Pynchon National Bank of $100 a share, amounting in all to $200,000, to be paid by them ratably on or before May 15, 1902; and on said March 18 he demanded payment of the assessment and directed the receiver to take all necessary steps for its collection.

June 14, 1902, and while this assessment and requisition were outstanding, the Springfield Institution for Savings, as owner of 371 shares of stock, paid to the receiver $30,360.17; the Springfield Five Cents Savings Bank, as owner of 120 shares, paid to the
23 receiver $9,820; and the Hampden Savings Bank, as owner of 65 shares, paid to him $5,319.16; said sums being $82 a share on the respective holdings of the banks.

There was no express agreement that the sums thus paid to the

receiver should be applied by him in part payment of the assessment then outstanding against these bank as stockholders Nothing was turned over by the receiver to the bank in exchange for these payments, and whether there was an implied or tacit understanding as to this matter is left open to be inferred or not from the agreed facts. The comptroller and the receiver believed that these sums, together with sums realized from the sale of certain mortgage bonds of the bank, which the receiver sold to stockholders other than the savings banks at an advance of $300 a bond in excess of their then market value, plus what could be realized out of other assets of the bank, would be sufficient to pay its debts in full; that no further payments would be required; and they so gave the savings banks to understand. Although there was no express agreement that the sums paid by the savings banks to the receiver should be applied in reduction of the assessment of March 18, 1902, I find that the savings banks in making these payments understood that they were to be applied in reduction of that assessment, and that the comptroller and receiver by their conduct so gave them to understand, and tacitly agreed to such an application. If, however, I am not warranted in drawing this conclusion from the agreed facts, then I find that the sums thus paid to the receiver were paid under a mistake of fact, and in the belief on the part of the savings banks that they were to be so applied.

July 22, 1902, after these payments had been made, the comptroller, still believing that the assets of the bank increased as above stated would be sufficient to pay its debts in full, attempted to withdraw the assessment of March 18, 1902, and instructed the receiver to suspend action to enforce its payment, and to notify the stockholders of its withdrawal, which he did.

December 28, 1906, the comptroller decided that to pay interest and expenses it was necessary to again assess the stockholders, and for this purpose he made an assessment and requisition upon
24 them for $98,000, that is, for $49 on each share of stock, payable on or before January 6, 1907, and directed the receiver to take the necessary steps to collect the same. The original bill is brought to enforce payment of this assessment.

I find that the Pynchon National Bank was insolvent on June 24, 1901, and has continued insolvent to the present time. The bank being insolvent July 22, 1902, when the comptroller undertook to withdraw the assessment of March 18, I ruled that the comptroller was without authority to make the withdrawal; and as that assessment was for 100 per cent of the par value of the stock, I rule that the second assessment of December 28, 1906, was invalid. Studebaker v. Perry, 184 U. S. 258.

In view of these findings and rulings, the original bill is dismissed as to the savings banks, with costs.

The cross-bill is dismissed without costs.

Petition for Appeal of Ellis S. Pepper, Receiver, from Final Decree on Original Bill.

[Filed June 3, 1914.]

To the Honorable District Judge for the District Court of the United States for the District of Massachusetts:

The above named plaintiff feeling himself aggrieved by the final decree made and entered in this cause on the third day of June, 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit for the reason specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that a transcript of the record, proceedings and report upon which said appeal was based, duly authenticated, may be sent to the United States Circuit Court [of Appeals] for the First Circuit.

CHARLES G. GARDNER,
Solicitor for Plaintiff.

25 *Assignment of Errors of Ellis S. Pepper, Receiver.*

[Filed June 3, 1914.]

And now, on this third day of June, 1914, comes the plaintiff, Ellis S. Pepper, receiver, and says that the final decree entered in the above-entitled case on the third day of June, 1914, is erroneous and unjust to him;

First. Because the District Court erred in not ruling and finding in accordance with the plaintiff's first request.

Second. Because the District Court erred in not ruling and finding in accordance with the plaintiff's second request.

Third. Because the District Court erred in not ruling and finding in accordance with the plaintiff's third request.

Fourth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's fourth request.

Fifth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's fifth request.

Sixth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's sixth request.

Seventh. Because the District Court erred in not ruling and finding in accordance with the plaintiff's seventh request.

Eighth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's eighth request.

Ninth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's ninth request.

Tenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's tenth request.

Eleventh. Because the District Court erred in not ruling and finding in accordance with the plaintiff's eleventh request.

Twelfth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's twelfth request.

Thirteenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's thirteenth request.

Fourteenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's fourteenth request.

Fifteenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's fifteenth request.

26 Sixteenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's sixteenth request.

Seventeenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's seventeenth request.

Eighteenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's eighteenth request.

Nineteenth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's nineteenth request.

Twentieth. Because the District Court erred in not ruling and finding in accordance with the plaintiff's twenty-first request.

Twenty-first. Because the court found and ruled that on June 14, 1902, and while the assessment and requisition of one hundred per cent (100%) were outstanding, the Springfield Institution for Savings, as owner of three hundred and seventy-one (371) shares of stock, paid to the receiver thirty thousand three hundred sixty and 17/100 dollars ($30,360.17); the Springfield Five Cents Savings Bank, as owner of one hundred and twenty (120) shares, paid to the receiver nine thousand eight hundred and twenty dollars ($9,820); and the Hampden Savings Bank, as owner of sixty-five (65) shares, paid to him five thousand three hundred nineteen and 16/100 dollars ($5,319.16), said sums being $82 a share on the respective holdings of the banks, without finding and ruling the circumstances under which and the purposes for which said payments were made.

Twenty-second. Because the court erred in not ruling and finding that said payments were the whole or a substantial part of the consideration for the purchase by the stockholders, at an advance of $300 a bond in excess of their then market value, of certain mortgage bonds of the bank.

Twenty-third. Because the court erred in finding and ruling that nothing was turned over by the receiver to the banks in exchange for the payments made by them, without finding that such payments were made in consideration of the purchase by the other stockholders of the mortgage bonds at an advance of $300 a bond in excess of their then market value.

Twenty-fourth. Because the court erred in finding and
27 ruling that the comptroller and receiver gave the savings banks to understand that the sums paid by them respectively, together with sums realized from the sale of certain mortgage bonds of the bank which the receiver sold to stockholders other than the savings bank at an advance of $300 a bond in excess of

their then market value, plus what could be realized out of other assets of said bank, would be sufficient to pay its debts in full.

Twenty-fifth. Because the court erred in finding and ruling that the savings banks in making these payments understood that they were to be applied in reduction of that assessment or that the comptroller and receiver by their conduct so gave them to understand or tacitly agreed to such application.

Twenty-sixth. Because the court erred in finding and ruling that if it was not warranted in drawing the conclusion from the agreed facts that the savings banks in making the payments understood that they were to be applied in reduction of the 100 per cent assessment, and that the comptroller and the receiver by their conduct so gave them to understand and tacitly agreed to such an application, then the sums paid by the receiver were paid under a mistake of fact and in the belief on the part of the savings banks that they were so applied.

Twenty-seventh. Because the court erred in not finding and ruling that said assessment of one hundred per cent (100%) was duly and legally withdrawn.

Twenty-eighth. Because the court erred in finding and ruling that the comptroller was without authority to make the withdrawal of the 100 per cent assessment.

Twenty-ninth. Because the court erred in finding and ruling that as the assessment was for one hundred per cent (100%) of the par value of the stock the second assessment of December 28, 1906, was invalid.

ELLIS S. PEPPER, *Receiver.*
By CHARLES G. GARDNER,
Of Counsel.

28 *Petition for Appeal of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank from Final Decree on Original Bill.*

[Filed June 3, 1914.]

Assignment of Errors of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank.

[Filed June 3, 1914.]

[Memorandum.—Copies of the foregoing Petition of Appeal of Savings Banks from Final Decree in original suit and the Assignment of Errors are not here printed as a waiver of this appeal was filed on June 22, 1914, and will be found printed on page 30 of this Transcript of Record.]

Petition for Appeal of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank from the Final Decree on Cross-bill.

[Filed June 3, 1914.]

To the Honorable District Judge for the District Court of the United States for the District of Massachusetts:

Each of the above-named plaintiffs feeling itself aggrieved by the final decree made and entered in this cause on the third day of June, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit for the reason specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that a transcript of the record, proceedings and report upon which said appeal was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

By Their Solicitor, BOYD B. JONES.

29 *Assignment of Errors of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank in re Final Decree on Cross-bill.*

[Filed June 3, 1914.]

And now, on this third day of June, 1914, comes each of the above-named plaintiffs and says that the final decree entered in the above-entitled case on the third day of June, 1914, is erroneous and unjust to it:

First. Because the District Court erred in not finding and ruling that the payment made by it to said receiver, to wit,

$30,360.17 by said Springfield Institution for Savings,

$9,820 by said Springfield Five Cents Savings Bank,

$5,319.16 by said Hampden Savings Bank,

was ultra vires of said savings banks making such payment.

Second. Because the District Court erred in not finding and ruling that each of said plaintiffs is entitled to recover of said receiver the payments so made, less the amount of an assessment of $49 a share on each share of the capital stock of said Pynchon National Bank owned by it.

Third. Because the District Court erred in not ruling and finding that each of said plaintiffs is entitled to further recover of said receiver interest on the amount so owed to it by the receiver by reason and on account of said ultra vires payment.

Fourth. Because the District Court erred in entering a final decree dismissing said bill of complaint.

By Their Solicitor, BOYD B. JONES.

30 *Petition for Appeal of Ellis S. Pepper, Receiver, from Final Decree on Cross-bill.*

[Filed June 3, 1914.]

Assignment of Errors of Ellis S. Pepper, Receiver, in re Final Decree on Cross-bill.

[Filed June 3, 1914.]

[Memorandum.—Copies of the foregoing Petition for Appeal of Ellis S. Pepper, Receiver, from Final Decree on Cross-Bill and the Assignment of Errors are not here printed, as a waiver of this appeal was filed on July 20, 1914, and will be found printed on page 30 of this Transcript of Record.]

On the twenty-second day of June, A. D. 1914, comes Boyd B. Jones, Esq., attorney, and waives the appeal of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank and the Hampden Savings Bank from final decree on original bill.

On the twentieth day of July, A. D. 1914, comes Charles G. Gardner, attorney, and waives the appeal of Ellis S. Pepper, Receiver, from the final decree on cross-bill.

31 *Citation on Appeal of Ellis S. Pepper, Receiver, from Final Decree on Original Bill.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Springfield Institution for Savings, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of Massachusetts; the Springfield Five Cents Savings Bank, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts; the Hampden Savings Bank of said Springfield, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the third day of July next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Ellis S. Pepper, of the city of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, receiver of The Pynchon National Bank of Springfield, a national banking association organized under

the laws of the United States of America, and having its usual place of business in the city of Springfield, county of Hampden and Commonwealth of Massachusetts, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George H. Bingham, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this ninth day of June, in the year of our Lord one thousand nine hundred and fourteen.

GEORGE H. BINGHAM,
U. S. Circuit Judge.

32 *Citation on Appeal of the Savings Banks from Final Decree on Cross-bill.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Ellis S. Pepper, of the city of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, Receiver of The Pynchon National Bank of Springfield, a national banking association organized under the laws of the United States of America, and having its usual place of business in the city of Springfield, county of Hampden and Commonwealth of Massachusetts (defendant in cross-bill), Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the third day of July next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein the Springfield Institution for Savings, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of Massachusetts; the Springfield Five Cents Savings Bank, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts; the Hampden Savings Bank of said Springfield, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts, (complainants in cross-bill), are appellants, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George H. Bingham, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this ninth day of June, in the year of our Lord one thousand nine hundred and fourteen.

GEORGE H. BINGHAM,
U. S. Circuit Judge.

33 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing are true copies of the Final Decree on Original Bill against defendants, the Springfield Institution for Savings, the Springfield Five Cents Savings Bank and the Hampden Savings Bank, and the Final Decree on Cross-Bill of said savings banks, entered June 3, 1914, the Statement of Case and Waiver of Bonds on Appeal, the Opinion of the Court of April 10, 1914, the Petitions for Appeal and Assignments of Errors, together with the original Citations issued in the cause in equity entitled,

No. 50.

ELLIS S. PEPPER, Receiver, Complainant,
v.
C. JENNIE ALLEN et al., Defendants.

Cross-bill of Complaint.

THE SPRINGFIELD INSTITUTION FOR SAVINGS, THE SPRINGFIELD FIVE Cents Savings Bank, and The Hampden Savings Bank, Complainants,
v.
ELLIS S. PEPPER, Receiver, Defendant,

now pending in said District Court.

And I further certify that the foregoing are the papers selected by the parties from the files to constitute the record on appeal from said-mentioned final decrees.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this twenty-third day of July, A. D. 1914.

[SEAL.] WILLIAM NELSON, *Clerk.*

34 *Order of Enlargement of Time for Docketing Case and Filing Record.*

July 3, 1914.

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Saturday, August 1, 1914.

FREDERIC DODGE, *Circuit Judge.*

35 United States Circuit Court of Appeals for the First Circuit, October Term, 1914.

No. 1080.

ELLIS S. PEPPER, Receiver, Appellant,
v.
SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellees.

No. 1081.

SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellants,
v.
ELLIS S. PEPPER, Receiver, Appellee.

Appeals from the District Court of the United States for the District of Massachusetts.

Before Putnam, Dodge, and Aldrich, JJ.

Opinion of the Court.

January 7, 1915.

PUTNAM, *J.*:

The propositions submitted to the court at the trial of this case suggested the necessity of determining whether we could be required to make offsets or rebates, involving any such troublesome questions as grew out of the failure of the Pacific National Bank, some of which appeared in Delano v. Butler, Receiver, 118 U. S. 634. An examination of this record, however, shows that the case was disposed of by the District Court on a very simple proposition, which enables us to affirm the results reached in that court without concerning ourselves at present about what may hereafter follow.

36 It seems there were two assessments on the stockholders of a failed national bank, the first one being for the full amount of the par of its stock, and the second one being for forty-nine per cent of the same par. There was an incomplete attempt to annul the first assessment of the par of the stock, and the present proceedings were instituted on the second assessment of forty-nine per cent. As we have said, there was an attempt to annul the first assessment and hold the second assessment valid, the court conceding that both assessments, which amounted to one hundred and forty-nine per cent, could not stand together, citing in support of that proposition Studebaker v. Perry, 184 U. S. 258. It is not apparent that Studebaker v. Perry ruled this particular point; but we have no occasion to cite authorities in reference to it, because it is too plain a proposition that assessments of one hundred forty-nine dollars a share would not be valid under the statute, to require any citation of authorities in reference thereto.

The attempt to invalidate the first assessment was put on the

following grounds by the court below. Our references to what was thus said do not require us to go into dates, or any details except those which we give, as follows:—

After the assessment of one hundred dollars per share was laid, an arrangement was entered into by which the creditors of the bank, and perhaps some others, arranged to take up a mass of bonds held by the insolvent bank, issued by the American Writing Paper Company, on terms which it was thought would make the insolvent bank solvent. Thereupon, the Comptroller of the Currency sent to the directors of the insolvent bank a letter, of which the following is a copy:—

"The Board of Directors, Pynchon National Bank, Springfield, Mass.:

"Gentlemen: In view of the effort now being made by the directors and stockholders of the Pynchon National Bank of Springfield, Mass. (insolvent), to dispose of to the stockholders a large number of the first mortgage bonds of the American Writing Paper Co., I wish to say to your Board that this will effect a settlement of the affairs of this Bank that will be eminently satisfactory to all interests, and one which I am very hopeful will be accomplished.

37 "I am just in receipt of the report of the special examination of this trust, made by an official of this Department, sent to Springfield for that purpose, and I am quite satisfied if this sale of bonds is effected the Receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.

"I wish further to say that after this examination it is very plain that there will be no escape from an assessment of 100 per cent against the stockholders, if the Receiver had to put the Writing Paper bonds on the market at 65 or thereabouts.

"The Receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95), the trust will pay out in full, and I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen,—which of course is highly improbable.

"I trust that you, gentlemen, will use every possible effort to effect this most satisfactory settlement of these matters.

"Respectfully,

"WM. B. RIDGELY, *Comptroller.*"

This letter was written by the Comptroller in good faith, and with the expectation that it would be shown, and it was shown, to the shareholders, including the Savings banks, parties to these proceedings. Those banks made certain payments to the receiver, which were not directly by way of purchasing any portion of the bonds of the American Writing Paper Company aforesaid, but were intended to make up certain deficiencies which came from disposing of some of those bonds to other parties, so as to leave the receiver

in the same condition in which he would have been if the Savings banks, parties to these proceedings, had taken these bonds on the same terms that other stockholders took them. These details we need not go into further, because the case as we leave it does not rest there. Thereupon, however, the enforcement of the first assessment of one hundred dollars on each share was suspended, but subsequently, for reasons which were not explained to us, it was thought necessary to make this other assessment of forty-nine dollars per share, which other assessment forms the basis of the present litigation, the primary question as to which is whether or not this assessment can be enforced.

38 So far as we can discover, the action of the Comptroller about not enforcing the first assessment was in pursuance of the letter which we have copied into this opinion. Neither that letter, nor anything which followed it, in terms annulled the first assessment; and all that can be said about it further is that no attempt was made to enforce it. The agreed statement which makes a part of the record states as follows:—

"Said letter of the Comptroller of the Currency addressed to the Board of Directors related to an effort then being made by the Directors, Stockholders and the Receiver to procure the purchase from the Receiver of said American Writing Paper Company bonds at the price at which they had been bought by the Bank. Said Directors and the Receiver were then of the opinion that if said purchase upon said terms could be effected it would provide sufficient funds to enable the Receiver of said Bank to pay its debts in full, thereby obviating the necessity for the payment of said assessment or the enforcement of any personal liability whatsoever on the part of the stockholders."

We find nothing further in the record, or in the opinion of the District Court, which shows any definite action in reference to the first assessment. Neither the record nor the opinion of the District Court assumes to discuss the question whether or not the assessment of one hundred dollars per share, laid by the Comptroller, could be annulled, or in any way disposed of, in this informal manner. The history of the statutes of the United States on this topic, and their nature, are well shown by Kennedy v. Gibson, 8 Wall. 498, 505, Bushnell v. Leland, 164 U. S. 684, and Studebaker v. Perry, ubi supra, at various points through the opinion. These citations show that the duty of the Comptroller in this connection was a quasi-judicial one, with the result that any findings, though ex parte, were abolutely binding on the shareholders, and were of a character which involved an accounting and a solemn record on the part of the Comptroller's Department. It is not credible that the solemn findings of the Comptroller of such a character should be nullified and wiped out by a mere letter such as we have quoted, followed by the

39 & 40 mere inaction of the kind we have described. However this may be, there is no thorough discussion in the record, or in the opinion of the District Court, which enables us to ascertain that the first assessment of the par of the stock was ever annulled. The correspondence merely shows an intention not to enforce it. On

this account, we agree without hesitation that the decree of the District Court dismissing the receiver's bill for the enforcement of the assessment of forty-nine per cent was correct; and, as the fate of the cross-bill here necessarily follows the fate of the original bill, the dismissal of the cross-bill was also correct.

The decree of the District Court refused any costs on the cross-bill, and the relations of the parties, on the whole, relieve us from the necessity of determining any right to costs on these appeals. Therefore, the judgment will be as follows, in each appeal:—

The decree of the District Court is affirmed, without costs.

41 & 42 These causes came on to be heard October 21 and 22, 1914, before Honorable William L. Putnam and Honorable Frederic Dodge, Circuit Judges, and Honorable Edgar Aldrich, District Judge.

Thereafter, to wit, on the seventh day of January, A. D. 1915, the Opinion of the Court (page 35) was announced and the following Final Decree was entered in each case:—

Final Decree.

January 7, 1915.

This cause came on to be heard October 21 and 22, 1914, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, January 7, 1915, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, without costs.

By the Court.

FRANCIS M. FOGARTY, *Clerk.*

Thereafter, to wit, on the tenth day of March, A. D. 1915, the following Motion to Stay Mandate was filed:—

Motion to Stay Mandate.

(Filed March 10, 1915.)

Now come all the parties in the above appeals and move that the mandates affirming the decrees of the District Court in both said actions be stayed and that said actions be not remanded to said District Court until the first day of May, 1915, in order that said parties may take such further action in connection therewith as is now contemplated by them.

BOYD B. JONES,
Attorney for Savings Banks.
CHARLES G. GARDNER,
Attorney for the Receiver.

On the same day the following Order of Court was entered:—

43 & 44 *Order of Court.*

March 10, 1915.

Upon agreement of counsel, It is ordered that the mandate in these cases be, and the same hereby are stayed till May 1, 1915.
By the Court.

FRANCIS M. FOGARTY, *Clerk.*

Thereafter, to wit, on the thirtieth day of April, A. D. 1915, upon motion made in open Court, the following Order of Court was entered in each case:—

Order of Court.

April 30, 1915.

It is ordered that the mandate herein be, and the same hereby is further stayed till June 1, 1915.
By the Court.

FRANCIS M. FOGARTY, *Clerk.*

Thereafter, to wit, on the twenty-sixth day of May, 1915, the following Petitions for Appeal and Assignments of Errors were filed:—

45 & 46 United States Circuit Court of Appeals for the First Circuit.

No. 1080.

ELLIS S. PEPPER, Receiver, Appellant,
v.
SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellees.

Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.

(Filed and Allowed May 26, 1915.)

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

The above-mentioned Ellis S. Pepper, Receiver, appellant respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the First Circuit and that decree therein was rendered and filed on the 7th day of January, 1915, affirming the decree of the District Court of the United States for the District of Massachusetts and that the matter in controversy in said suit exceeds in value one thousand dollars, besides costs; that this cause is one in which the decree of the Circuit Court of Appeals

is not final and a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Ellis S. Pepper as Receiver as aforesaid prays that an appeal be allowed him in the above-entitled cause and that the Clerk of the United States Circuit Court of Appeals for the First Circuit be directed to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

CHARLES G. GARDNER,
Solicitor and Counsel for Appellant.

GARDNER, GARDNER & STODDARD,
Of Counsel.

47 & 48 *Assignment of Errors Filed by the Appellant in Connection with His Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.*

(Filed May 26, 1915.)

And now on this thirtieth day of April, 1915, comes the plaintiff, Ellis S. Pepper, Receiver, and says that the decree entered in the above-entitled case on the seventh day of January, 1915, is erroneous and unjust to him:

1st. Because the Court erred in not adjudging and decreeing that the plaintiff was entitled to recover from the Savings Banks forty-nine dollars per share upon the shares held by them respectively, together with interest from Jan. 26, 1907.

2nd. Because the Court erred in not adjudging and decreeing that the plaintiff was entitled to recover from the Savings Banks said assessment of $49 per share and interest unless the same has been paid, or unless excepting for said assessment the Savings Banks would be entitled to recover from the Receiver the amounts paid by them in connection with the plan for the purchase of the American Writing Paper Company bonds.

3rd. Because the Court erred in not adjudging and decreeing that there was no evidence upon which it was competent for the trial Court to find that any part of the assessment now sought to be recovered has been paid.

4th. Because the Court erred in not adjudging and decreeing that there was no evidence to warrant a finding that but for the assessment now sought to be enforced the Savings Banks would be entitled to recover from the Receiver the amounts paid by them in connection with the bond transaction.

5th. Because the Court erred in not adjudging and decreeing that there was no sufficient evidence upon which it was competent for the

trial Court to find that the amounts paid by the Savings Banks in connection with the bond plan were gifts or in the nature of gifts.

6th. Because the Court erred in not adjudging and decreeing that the evidence offered by the Savings Banks that on the 10th
49 & 50 day of April, 1902, the Comptroller sent to the directors of the National Bank a letter of which the following —:

"The Board of Directors, Pynchon National Bank, Springfield, Mass.

GENTLEMEN: In view of the effort now being made by the directors and stockholders of the Pynchon National Bank of Springfield, Mass. (insolvent) to dispose of to the stockholders a large number of the first mortgage bonds of the American Writing Paper Co., I wish to say to your Board that this will effect a settlement of the affairs of this Bank that will be eminently satisfactory to all interests, and one which I am very hopeful will be accomplished.

I am just in receipt of the report of the special examination of this trust made by an official of this Department sent to Springfield for that purpose, and I am quite satisfied if this sale of bonds is effected the Receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.

I wish further to say that after this examination it is very plain that there will be no escape from an assessment of 100 per cent against the stockholders, if the Receiver had to put up the Writing Paper bonds on the market at 65 or thereabouts.

The Receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95) the trust will pay out in full and I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen,—which of course is highly improbable.

I trust that you gentlemen will use every possible effort to effect this most satisfactory settlement of these matters.

Respectfully, WM. B. RIDGELY,
Comptroller."

that said letter was written by the Comptroller in good faith and with the expectation that it would be, and it was shown to the shareholders including said Savings Banks; that at the date of said letter and at the time when the Pynchon National Bank was de-
51 & 52 clared to be insolvent the assets of that bank included bonds of the American Writing Paper Company of the par value of $577,000; that said bonds had been purchased by said National Bank; that said letter of the Comptroller related to an effort being made by the Directors, Stockholders and Receiver to procure the purchase from the Receiver of said bonds at the price at which they had been bought by the bank, namely, the sum of $529,150; that said Directors and Receiver were then of the opinion that if said purchase price upon said terms could be effected it would provide sufficient funds to enable the Receiver to pay the debts of the National Bank in full, thereby obviating the necessity for enforcing the personal liability of stockholders; that the purchase of the bonds at $950

each was consummated under an arrangement entered into by the Receiver with the knowledge and approval of the Comptroller whereby the stockholders generally were to take at the price of $950 each three bonds for every ten (10) shares of the stock of the National Bank owned by them respectively; that inasmuch as it was ultra vires of Massachusetts Savings Banks under the statutes of that Commonwealth, as the Receiver and Comptroller then well knew, to purchase such bonds as an investment it was arranged with the knowledge and approval of the Comptroller and the Receiver that the Savings Banks instead of purchasing their proportion of the bonds should pay the difference between their then market value and what the National Bank paid for them; that the proportion of the bonds which the Savings Banks would have taken was by agreement between the Receiver and other stockholders sold by the latter at their then market value and the proceeds of such sales paid to the Receiver so that the receiver retained none of said bonds; that the Savings Banks did not purchase any of the bonds or receive any consideration or anything of value for their contributions which they however made with the expectation and hope that the bank would thereby be made solvent and their liability as stockholders for its indebtedness would thereby be extinguished; that these payments amounted to $82 per share of the holdings of said Savings Banks respectively and were made by checks payable to one Ellis who represented the stockholders in carrying out the arrangements with the Receiver and that said checks payable to said Ellis, or order, were forthwith endorsed by him and delivered to the Receiver; that the Receiver and Comptroller then knew the capacity in which Ellis acted and that the
53 & 54 checks were given for the purposes and under the circumstances above set forth without any agreement or obligation on the part of the Comptroller or Receiver that such payments should in whole or in part discharge the liability of the Savings Banks as stockholders excepting so far, if at all, as such agreement or obligation might lawfully be implied from the facts stated in the stipulation entered into between the parties; that the Receiver with the knowledge and approval of the Comptroller retained the payments made as above set forth and applied them toward the payment of the debts of the National Bank, and all other evidence relating to said bonds, their sale and the receipt and disposition of the proceeds of such sale contained in said stipulation should have been excluded by the Master on the ground that it was incompetent, irrelevant and immaterial.

7th. Because the Court erred in not adjudging and decreeing that the evidence offered by the Savings Banks consisting of six exhibits as follows should have been excluded by the Master on the ground that it was incompetent, irrelevant and immaterial:

EXHIBIT 1.

Payable if desired at Chase Nat. Bank New York.

SPRINGFIELD, MASS., Jun- 14, 1902. No. 6329.

The Springfield Five Cents Savings Bank

Pay to the order of R. W. Ellis Trustee $9820.00 Ninety eight hundred and twenty dollars.

To the Springfield National Bank, Springfield, Mass.
HENRY D. MARSH,
Ass't Treasurer.

(Endorsed:) R. W. Ellis Trustee. The Pynchon National Bank, Springfield, Mass. by Ellis S. Pepper Rec'r.

EXHIBIT 2.

Payable if desired at the National Bank of Redemption, Boston, Mass.
Springfield Institution for Savings.

$30,360.17. SPRINGFIELD, MASS., June 14/1902.

The Chicopee National Bank of Springfield, Mass.,

Pay to the order of Ralph W. Ellis Trustee Thirty thousand three hundred sixty & 17/100 Dollars.
JOSEPH C. BOOTH, *Treasurer.*

No. 21223.

55 & 56 (Stamped on face:) The Chicopee Nat'l Bank Springfield, Mass. Paid Jun- 19, 1902.

(Endorsed:) Ralph W. Ellis, Trustee. The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r.

Pay to The Nat'l Exchange Bank, of Boston, Mass., or Order, Springfield National Bank, Springfield, Mass.
RALPH P. ALDEN, *Cashier.*

All Endorsements Guaranteed.
Paying Teller, Boston, Jun- 18, 1902.
Nat'l Bank of Redemption.

Paid through Clearing House, Jun- 18, 1902.
NAT'L EXCHANGE BANK, BOSTON,
C. A. PRICE, *Cashier.*

EXHIBIT 3.

$5,319.17.

Hampden Savings Bank.

SPRINGFIELD, MASS., June 14, 1902.

Agawam National Bank of Springfield:

Pay to the order of Ralph W. Ellis, Trustee, Fifty-three hundred nineteen 17/100 Dollars.

No. 7630.

E. S. BAILEY, *Treasurer.*

(Stamped on face:) Paid June 17, 1902, The Agawam National Bank, Springfield, Mass.

(Endorsed:) Ralph W. Ellis, Trustee. The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r.

Pay only through the Springfield Clearing House.

June 17, 1902.

To The Springfield Nat'l Bank, Ralph P. Alden, Cashier.

EXHIBIT 4.

The Hampden Savings Bank, Springfield, Massachusetts.

Dwight O. Gilmore, President.
John B. Phelps, Treasurer.

57 & 58 At a meeting of the Board of Investment of the Hampden Savings Bank, held April 26, 1902, the following vote was taken:

"A proposition from Pynchon Bank Directors for us to pay difference between 70 & 95, 25% on 19000 American Writing Paper Bonds in lieu of an assessment of 100% (4,750 instead of 6,500) was referred to F. H. Stebbins with power."

P. S. BAILEY, *Clerk.*

Approved by F. H. S.

I hereby certify that the foregoing is a true copy of the record of a vote of the Investment Committee of the Hampden Savings Bank passed on April 26, 1902.

JOHN B. PHELPS,
Clerk of Investment Committee.

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

January 10, 1914.

Then personally appeared the above named John B. Phelps and made oath that the foregoing affidavit by him subscribed is true before me.

[SEAL.] FRANK E. CARPENTER,
Notary Public.

EXHIBIT 5.

Springfield Institution for Savings, Incorporated 1827.

Winford N. Caldwell, President; A. A. Packard, Vice-President; John W. B. Brand, Treasurer; Joseph E. Holmes, Ass't Treasurer, Springfield, Mass.

At a special meeting of the Board of Trustees of the Springfield Institution for Savings held May 7, 1902, it was voted:

That the Board of Investment be authorized to enter into an agreement with the receiver and directors of the Pynchon National Bank with a view to the adjustment of the relations of this Institution to that Bank, and to the discharge of its liability as a stockholder of the Bank, in such form as to them shall seem best.

[SEAL.] JOHN W. B. BRAND, *Treasurer.*

A true copy, attest:

——— ———.

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

SPRINGFIELD, MASS., January 10th, 1914.

Then personally appeared John W. B. Brand, Treasurer of Springfield Institution for Savings, and made oath that the above is a true copy of a vote of the Board of Trustees of said Institu-
59 & 60 tion as appears by the official records of said meeting, before me.

[SEAL.] W. MEREDITH WHARFIELD,
Notary Public.

EXHIBIT 6.

Springfield Institution for Savings, Incorporated 1827.

Winford N. Caldwell, President; A. A. Packard, Vice-President; Joseph Shattuck, Jr., Treasurer; John W. B. Brand, Ass't Treasurer, Springfield, Mass.

Profit and Loss.—Paid Ralph W. Ellis, Trustee, to be turned over to Receiver of the Pynchon National Bank, that we may, as is believed probable, thereby avoid assessment of 100% on 371 shares Pynchon National Bank Stock (See vote Trustees May 7, $30,360.17

I hereby certify that the foregoing is a true copy of the charge made on the cash book of the Springfield Institution for Savings June 30, 1902.

JOHN W. B. BRAND,
Ass't Treas.

March 22, 1909.

8th. Because the Court erred in not adjudging and decreeing that there was no sufficient evidence to warrant a finding that there was any agreement or obligation on the part of the Comptroller or Receiver that the payments made by the Savings Banks, respectively, in connection with the bond transaction should in whole or in part discharge their liability for or on account of the indebtedness of the National Bank and any stock assessments against them as stockholders.

9th. Because the Court erred in not adjudging and decreeing that even if it should be found that there was such an agreement or understanding or obligation (referred to in the 8th assignment) the same did not in any way affect the liability of the Savings Banks for the present assessment.

10th. Because the Court erred in not adjudging and decreeing that the fact that the Comptroller stated in his letter of April 10th, 1902, that "I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen—which of course is highly improbable" and that it did not appear that any unlooked for shrinkage in value of assets subsequently occurred, did not impair or in any way affect the right of the Receiver to enforce the payment of the present assessment.

61 & 62 11th. Because the Court erred in not adjudging and decreeing that under the circumstances disclosed by the record it would not have been ultra vires of the Savings Banks to purchase their proportion of the bonds to be taken by the stockholders generally in pursuance of the plan shown therein.

12th. Because the Court erred in not adjudging and decreeing that if it would have been within the powers of the Savings Banks under the circumstances disclosed to purchase their proportion of the bonds or any part thereof it was lawful and proper for them to contribute in proportion to their holdings of National Bank stock to the fund then being raised by the stockholders generally for the purpose of taking the bonds off of the hands of the Receiver at the price they cost the National Bank.

13th. Because the Court erred in not adjudging and decreeing that the evidence warranted a finding by the trial Court that what the Savings Banks did in connection with the bond plan would have been done by a prudent, natural person under like circumstances for the protection of his own interests and therefore was not ultra vires.

14th. Because the Court erred in not adjudging and decreeing that whether or not what the banks did was in fact ultra vires, the matter was fully executed and completed before the bringing of the original and cross bills and the Savings Banks are accordingly not entitled to the relief sought.

15th. Because the Court erred in not adjudging and decreeing that even if the Savings Banks under any circumstances might have been entitled to relief under the original or cross bill they are now barred by their laches.

16th. Because the Court erred in not adjudging and decreeing

that stockholders other than the Savings Banks entered into and carried out the plan relating to the purchase of the bonds in the belief that the Savings Banks were to bear their proportionate share of the expense of restoring the National Bank to a condition of solvency, and when they paid their money it was with the understanding and belief that the National Bank would receive the benefit from the sale of all the bonds at $950 each and that such belief and understanding were fully justified by the conduct of the Savings Banks.

17th. Because the Court erred in not adjudging and decreeing that it would not be in accordance with the principles of equity and good conscience to permit the Savings Banks to recover the
63 & 64 whole or any part of the sums paid by them in connection with the bond transaction at the expense of the other stockholders.

18th. Because the Court erred in not adjudging and decreeing that there was good and sufficient consideration, moving from the Receiver and the other shareholders, for the payment by the Savings Banks of the amounts paid by them in connection with the bond transaction.

19th. Because the Court erred in adjudging and decreeing that there was an incomplete attempt to annul the first assessment.

20th. Because the Court erred in adjudging and decreeing that there was an attempt to annul the first assessment, without adjudging and decreeing that said assessment was thereby annulled so far as necessary to enable the Receiver to maintain his action for the recovery of the present assessment.

21st. Because the Court erred in adjudging and decreeing that assessments of 149% would not be valid under the Statute, without finding and ruling that the making of the assessments to that extent did not impair the right of the Comptroller to enforce the individual liability of shareholders for the debts of the National Bank up to the maximum amount provided by Statute.

22nd. Because the Court erred in adjudging and decreeing that the decision of the District Court as to the attempt to invalidate the first assessment was based upon the grounds stated (principally the Comptroller's letter of April 10th, '02) instead of adjudging and decreeing that the District Court found that what it characterized as an attempt to withdraw that assessment was put upon entirely different grounds, principally the letter of withdrawal of Jan. 22, 1902, sent to the shareholders by the Receiver under the direction of the Comptroller.

23rd. Because the Court erred in adjudging and decreeing that there ever was an attempt to "invalidate" the first assessment.

24th. Because the Court erred in adjudging and decreeing that the validity or sufficiency of the withdrawal of the first assessment depended wholly or principally on the Comptroller's letter of April 10th, 1902, and the fact that no further attempt was made to enforce that assessment.

25th. Because the Court erred in adjudging and decreeing that

the action of the Comptroller about not enforcing the first assessment was in pursuance of his letter of April 10th, 1902.

65 & 66 26th. Because the Court erred in adjudging and decreeing in effect that with the exception of the Comptroller's letter of April 2, 1902, and the absence of any attempt thereafter to enforce said assessment there was no evidence of any definite action by the Comptroller with reference to that assessment.

27th. Because the Court erred in adjudging and decreeing that the duty of the Comptroller in the matter of making or withdrawing assessments upon the stockholders of an insolvent national bank involves a solemn record in his department.

28th. Because the Court erred in not adjudging and decreeing that the right of the Receiver under the direction of the Comptroller to enforce by statute the individual liability of shareholders does not depend wholly or in part upon whether the making of that assessment or the withdrawal of a previous unpaid assessment is a matter of solemn or other record in the Comptroller's department.

29th. Because the Court erred in not adjudging and decreeing that the right of the Receiver to maintain his bill is not affected by any question of whether there was any record in the Comptroller's department relating to the withdrawal of the first assessment.

30th. Because the Court erred in not adjudging and decreeing that the record showed a definite intention on the part of the Comptroller to withdraw the first assessment and definitely to discontinue any further action in connection therewith and that if any formal withdrawal of that assessment was necessary to enable the Receiver to maintain his bill his instruction to the Receiver to send to the stockholders the letter of July 22nd, 1902, and the sending of that letter in pursuance of such instruction constituted a sufficient withdrawal.

31st. Because the Court erred in adjudging and decreeing that the enforcement of the first assessment was suspended without adjudging and decreeing that the Comptroller's order to suspend action on that assessment was in connection with the decision on his part to withdraw that assessment which was duly communicated to the Stockholders and which showed definitely that no further action would be taken with reference to the first assessment.

32nd. Because the Court erred in not adjudging and decreeing that it was immaterial how many so-called assessments the Comptroller might make or what the aggregate amount thereof

67 & 68 might be with reference to the par of the National Bank stock or whether one or more of such assessments might be outstanding when the Comptroller decided as provided by statute that it was necessary to enforce the individual liability of shareholders and directed the Receiver to take the necessary steps for that purpose, so long as no attempt was made to exceed the maximum statutory liability and there was no violation of the provision that shareholders' liability shall be borne equally and ratably and no question of the effect of any statute of limitations is presented.

33rd. Because the Court erred in not adjudging and decreeing

that so far as necessary to enable the Receiver to maintain his bill the first assessment was sufficiently and effectually withdrawn.

34th. Because the Court erred in not adjudging and decreeing that the Receiver is entitled to maintain his bill without reference to whether the first assessment was or was not formally or effectually withdrawn.

35th. Because the Court erred in not adjudging and decreeing that the Savings Banks were estopped by their laches and acquiescence during the period between the letter of withdrawal (July 22nd, 1902) and the bringing of the original and cross bills subsequent to the making of the second assessment (Dec. 28, 1906) from claiming that there was no sufficient withdrawal of the first assessment or that any withdrawal thereof was necessary to enable the Receiver to maintain his bill.

36th. Because the Court erred in not adjudging and decreeing that the Savings Banks were estopped by bringing their cross bill for the purpose of having the payments made by them in connection with the bond plan applied upon the second assessment, from claiming that said assessment was invalid.

37th. Because the Court erred in not adjudging and decreeing that if anything further was required for a sufficient withdrawal of the first assessment, the same was waived by the Savings Banks.

38th. Because the Court erred in not adjudging and decreeing that the fact that the assessment of one hundred per cent was made and withdrawn afforded no defense to the assessment now sought to be recovered.

39th. Because the Court erred in not adjudging and decreeing that under the circumstances disclosed it was competent and proper for the Comptroller to withdraw the first assessment in the manner adopted by him and his right to levy and enforce the present assessment is in no wise impaired or affected thereby.

69 & 70 40th. Because the Court erred in not finding and ruling that there are no facts disclosed by the record constituting a defense on the part of the Savings Banks to the Receiver's bill.

CHARLES G. GARDNER,
Solicitor and Counsel for Appellant.

GARDNER, GARDNER & STODDARD,
Of Counsel.

United States Circuit Court of Appeals for the First Circuit.

No. 1081.

SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellants,
v.
PEPPER, Receiver, Appellee.

Cross Bill.

Petition for Appeal of Each the Springfield Institution for Savings, the Springfield Five Cents Savings Bank and the Hampden Savings Bank, Defendants and Cross Compiainants, Appellants.

(Filed and Allowed May 26, 1915.)

Each of the above named petitioners, appellants, is aggrieved by the final decree made and entered in said cross bill on the seventh day of January, 1915, by the Circuit Court of Appeals for the First Circuit affirming the final decree of the District Court of the United States for the District of Massachusetts, and each of said petitioners appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith.

Said bill of complaint was brought by said Pepper as receiver of a national banking association to recover of each of said petitioners a sum in excess of one thousand dollars, by reason of its alleged liability for the debts of such association as shareholder thereof, under the laws of the United States; and said cross bill was brought by each petitioner to recover of said receiver money paid to
71 & 72 him in his aforesaid capacity ultra vires of said petitioner and in excess of such alleged liability; that is to say, by said Springfield Institution for Savings, $30,360.17, by said Springfield Five Cents Savings Bank, $9,820, and by said Hampden Savings Bank $5,319.16. Said bill of complaint and cross bill are not cases wherein the judgment or decree of the Circuit Court of Appeals is final, and each of said matters in controversy therein exceeds $1,000 besides costs.

Wherefore each of said petitioners prays that its appeal may be allowed and that a transcript of the record upon which said appeal is based, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in said assignment of errors may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

By Their Solicitors, WILLIAM H. BROOKS.
BOYD B. JONES.

Assignment of Errors of the Springfield Institution for Savings, the Springfield Five Cents Savings Bank, and the Hampden Savings Bank, Defendants and Cross-Complainants, Appellants.

(Filed May 26, 1915.)

And now, on this 26th day of May, 1915, comes each of the above named defendants and cross complainants, appellants, and, in connection with its petition for appeal herein, presents and files therewith its assignment of errors, and says that the final decree entered in the above entitled cross bill by the Circuit Court of Appeals for the First Circuit on the seventh day of January, 1915, is erroneous and unjust to it,—

First. Because said Circuit Court of Appeals erred in not adjudging and decreeing as one ground for deciding that said second assessment of forty-nine dollars on each share of the capital stock of the Pynchon National Bank was illegal and void, that a payment made by this appellant to the receiver, to wit, $30,360.17 by said Springfield Institution for Savings, $9,820 by said Springfield Five Cents Savings Bank, and $5,319.16 by said Hampden Savings Bank, was made on account of a first assessment of one hundred dollars on each share of said capital stock, and that therefore the
73 & 74 Comptroller has no authority to withdraw the first assessment or to make the second one.

Second. Because the Circuit Court of Appeals erred in not adjudging and decreeing that said payment made by this appellant to said receiver was ultra vires of the appellant making it, and in not adjudging and decreeing that this appellant is entitled under said cross bill to recover of said receiver the moneys so paid by it.

Third. Because the Circuit Court of Appeals erred in not adjudging and decreeing that if the receiver did not agree to apply the aforesaid amount paid by the appellant, to the payment of said assessment of one hundred dollars, such payment was made by it, as the receiver knew when accepting it, under a mistake of fact and in the belief that it was to be so applied, and in not adjudging and decreeing that this appellant is entitled to recover under said cross bill the money so paid.

Fourth. Because said Circuit Court of Appeals erred in not adjudging and decreeing that if said second assessment of forty-nine dollars is valid, and if this appellant made said payment ultra vires, it is entitled to recover the same under the cross bill less the amount of the second assessment.

Fifth. Because said Circuit Court of Appeals erred in not adjudging and decreeing that if the second assessment of forty-nine dollars is valid, and if this appellant made said payment under a mistake of fact, known to the receiver when accepting it, this appellant is entitled to recover the same under the cross bill less the amount of the second assessment.

Sixth. Because said Circuit Court of Appeals erred in entering a final decree dismissing said cross bill.

Seventh. Because said Circuit Court of Appeals erred in not decreeing costs to this appellant.

By Their Solicitors, WILLIAM H. BROOKS.
BOYD B. JONES.

75 & 76 United States Circuit Court of Appeals for the First Circuit.

No. 1081.

SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellants,
v.
ELLIS S. PEPPER, Receiver, Appellee.

Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.

(Filed and Allowed May 26, 1915.)

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

The above mentioned Ellis S. Pepper, Receiver, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the First Circuit and that decree therein was duly rendered and filed on the 7th day of January, 1915, affirming the decree of the District Court of the United States for the District of Massachusetts and that the matter in controversy in said suit exceeds in value one thousand dollars, besides costs; that this cause is one in which the decree of the Circuit Court of Appeals is not final and is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Ellis S. Pepper as Receiver prays that an appeal be allowed him in the above entitled cause and that the Clerk of the United States Circuit Court of Appeals for the First Circuit be directed to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellee may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

CHARLES G. GARDNER,
Solicitor and Counsel for Appellee.

GARDNER, GARDNER & STODDARD,
Of Counsel.

77 & 78 *Assignment of Errors Filed by the Appellee in Connection with His Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.*

(Filed May 26, 1915.)

And now this seventh day of May, 1915, comes the defendant, Ellis S. Pepper, Receiver, and says that the decree entered in the above entitled case on the seventh day of January, 1915, is erroneous and unjust to him.

Because the Court erred in not adjudging and decreeing that the cross bill should be dismissed on the ground that nothing was shown in the record entitling the plaintiffs to any relief sought by said bill.

CHARLES G. GARDNER,
Solicitor and Counsel for Appellee.

GARDNER, GARDNER & STODDARD,
Of Counsel.

On the same day, to wit, the twenty-sixth day of May, 1915, the following Waiver of Service of Citations and of Bonds on Appeal was filed:

United States Circuit Court of Appeals for the First Circuit.

No. 1080.

PEPPER, Receiver, Appellant,
v.
SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellees.

No. 1081.

SPRINGFIELD INSTITUTION FOR SAVINGS et al., Appellants,
v.
PEPPER, Receiver, Appellee.

Waiver of Service of Citations and of Bonds on Appeal.

(Filed May 26, 1915.)

Each of the parties to the above entitled suits waive service of citations and giving of appeal bonds on the appeals of the others.

BOYD B. JONES,
Solicitor for Appellees, Springfield Institution for Savings et al.
CHARLES G. GARDNER,
Solicitor for Ellis S. Pepper, Receiver.

79 & 80 On the same day, to wit, May 26, 1915, the following Order of Court was entered in each case:

Order of Court.

May 26, 1915.

Upon the filing of the petitions for appeal to the Supreme Court, the assignments of errors and the waiver of bonds on appeals and service of citations of both parties, It is ordered that citation, signed by the Senior Circuit Judge, issue.

By the Court.

FRANCIS M. FOGARTY, *Clerk.*

81 & 82 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Springfield Institution for Savings, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of Massachusetts; the Springfield Five Cents Savings Bank, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts; the Hampden Savings Bank of said Springfield, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington,* on the twenty-third day of June next, pursuant to an Appeal duly obtained from a decree of the† United States Circuit Court of Appeals for the First Circuit wherein Ellis S. Pepper, of the city of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, receiver of the Pynchon National Bank of Springfield, a national banking association organized under the laws of the United States of America, and having its usual place of business in the city of Springfield, county of Hampden and Commonwealth of Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, Senior Circuit Judge and a judge of the United States Circuit Court of Appeals for the First Circuit, this twenty-sixth day of May, in the year of our Lord one thousand nine hundred and fifteen.

W. L. PUTNAM,
Senior Circuit Judge.

---

* Not exceeding 30 days from the day of signing.

† Name of Court in which the Decree is entered.

83 & 84 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Ellis S. Pepper, of the City of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, Receiver of The Pynchon National Bank of Springfield, a national banking association organized under the laws of the United States of America, and having its usual place of business in the city of Springfield, county of Hampden and Commonwealth of Massachusetts (defendant in cross-bill), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington* on the twenty-third day of June next, pursuant to an Appeal duly obtained from a decree of the† United States Circuit Court of Appeals for the First Circuit wherein the Springfield Institution for Savings, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of Massachusetts; the Springfield Five Cents Savings Bank, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts; the Hampden Savings Bank of said Springfield, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts (complainants in cross-bill), are appellants and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, Senior Circuit Judge and a judge of the United States Circuit Court of Appeals for the First Circuit, this twenty-sixth day of May, in the year of our Lord one thousand nine hundred and fifteen.

W. L. PUTNAM,
Senior Circuit Judge.

---

* Not exceeding 30 days from the day of signing.
† Name of Court in which the Decree is entered.

85 & 86 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Springfield Institution for Savings, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of Massachusetts; the Springfield Five Cents Savings Bank, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts; the Hampden Savings Bank of said Springfield, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual place of business in said Springfield, and a citizen of the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the* twenty-third day of June next, pursuant to an Appeal duly obtained from a decree of the† United States Circuit Court of Appeals for the First Circuit wherein Ellis S. Pepper, of the city of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, receiver of the Pynchon National Bank of Springfield, a national banking association organized under the laws of the United States of America, and having its usual place of business in the city of Springfield, county of Hampden and Commonwealth of Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, Senior Circuit Judge and a judge of the United States Circuit Court of Appeals for the First Circuit, this twenty-sixth day of May, in the year of our Lord one thousand nine hundred and fifteen.

W. L. PUTNAM,
Senior Circuit Judge.

---

* Not exceeding 30 days from the day of signing.
† Name of Court in which the Decree is entered.

87 *Clerk's Certificate.*

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, Certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the causes entitled, No. 1080. Ellis S. Pepper, Receiver, Appellant, v. Springfield Institution for Savings et al., Appellees No. 1081. Springfield Institution for Savings et al., Appellants, v. Ellis S. Pepper, Receiver, Appellee, in said Circuit Court of Appeals determined, the Petitions for appeal, the Assignments of Errors, the

Waiver of Service of Citations and Bonds on Appeal and also the original Citations upon the appeals of both parties.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit the twenty-eighth day of May, A. D. 1915.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

Endorsed on cover: File No. 24,765. U. S. Circuit Court Appeals, 1st Circuit. Term No. 489. Ellis S. Pepper, receiver of The Pynchon National Bank, appellant, vs. Springfield Institution for Savings, Springfield Five Cents Savings Bank, and Hampden Savings Bank. File No. 24,766. Term No. 490. Springfield Institution for Savings, Springfield Five Cents Savings Bank, and Hampden Savings Bank, appellants, vs. Ellis S. Pepper, receiver of The Pynchon National Bank. Filed June 10th, 1915. File Nos. 24,765 and 24,766.

(24,765)
(24,766)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 144

Ellis S. Pepper, Receiver of the Pynchon National Bank,

APPELLANT,

vs.

Springfield Institution for Savings, Springfield Five Cents Savings Bank, and Hampden Savings Bank,

APPELLEES.

No. 145

Springfield Institution for Savings, Springfield Five Cents Savings Bank, and Hampden Savings Bank,

APPELLANTS,

vs.

Ellis S. Pepper, Receiver of the Pynchon National Bank,

APPELLEE.

BRIEF FOR CHARLES A. KORBLY, RECEIVER,
successor of Ellis S. Pepper, Receiver, deceased.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 144.

ELLIS S. PEPPER, RECEIVER,
APPELLANT,
v.
SPRINGFIELD INSTITUTION FOR SAVINGS ET AL.,
APPELLEES.

No. 145.

SPRINGFIELD INSTITUTION FOR SAVINGS ET AL.,
APPELLANTS,
v.
ELLIS S. PEPPER, RECEIVER,
APPELLEE.

BRIEF FOR THE RECEIVER.

STATEMENT OF CASE.

The original bill was brought by Ellis S. Pepper, as Receiver of the Pynchon National Bank of Springfield to recover an assessment of forty-nine dollars ($49) per share levied by the Comptroller of the Currency pursuant to Sections 5151 and 5234 of the Revised Statutes of the United States.

Pending these appeals Ellis S. Pepper, the plaintiff in the original bill and the defendant in the cross-bill has died. Charles A. Korbly, his successor as Receiver, has been duly admitted as plaintiff and defendant respectively in said actions.

The Pynchon National Bank, organized under the laws of the United States and located at Springfield, Massachusetts, had a capital stock of two hundred thousand dollars ($200,000) divided into two thousand (2,000) shares of the par value of one hundred dollars ($100) each, all of which had been issued and were outstanding at the time of the appointment of the Receiver. The savings banks, organized under the laws of Massachusetts, were located in said Springfield. At the time of the appointment of the Receiver the savings banks held stock in the national bank aggregating five hundred and fifty-six (556)

shares, somewhat more than one-fourth of its entire capital stock (rec. p. 7).

On June 24, 1901, the Comptroller of the Currency determined that the national bank was insolvent and appointed the said Pepper Receiver thereof. He duly qualified as such Receiver and up to the time of his death he was the duly appointed, qualified and acting Receiver of the national bank (rec. p. 7).

On March 18, 1902, the Comptroller decided that in order to pay the debts of the national bank it was necessary to enforce the individual liability of stockholders to the extent of the par of their shares and directed the Receiver to take the necessary steps therefor (rec. p. 7).

Among the assets of the national bank were mortgage bonds of the American Writing Paper Company of the par value of five hundred and seventy-seven thousand dollars ($577,000) which it had purchased shortly before its failure, at the price of five hundred twenty nine thousand one hundred and fifty dollars ($529,150) (rec. p. 8).

In this situation the directors, stockholders and Receiver of the national bank, being of the opinion that if these bonds could be sold for the amount they cost the national bank its assets would be increased to the extent that its obligations could be paid in full without the necessity of any assessment, had undertaken to procure their sale to the stockholders at that price (rec. p. 8).

This plan had the approval of the Comptroller as appears by his letter addressed to the directors under date of April 10, 1902:

"The Board of Directors, Pynchon National Bank, Springfield, Mass.,

GENTLEMEN: In view of the effort now being made by the directors and stockholders of the Pynchon National Bank of Springfield, Mass, (insolvent). to dispose of to the stockholders a large number of the first mortgage bonds of the American Writing Paper Co., I wish to say to your Board that this will effect a settlement of the affairs of this Bank that will be eminently satisfactory to all interests, and one which I am very hopeful will be accomplished.

I am just in receipt of the report of the special examination of this trust made by an official of this Department sent to Springfield for that purpose, and I am quite satisfied if this sale is effected the Receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.

I wish further to say that after this examination it is very plain that there will be no escape from an assessment of one hundred per cent against the stockholders if the Receiver had to put the Writing Paper bonds on the market at 65 or thereabouts.

The Receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95) the trust will pay out in full and I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen, which of course is highly improbable.

I trust that you gentlemen will use every possible effort to effect this most satisfactory settlement of these matters.

Respectfully,
WM. B. RIDGELY, *Comptroller.*"
(Rec. pp. 7, 8.)

A sale upon these terms was procured by selling to each shareholder of the national bank at the price of nine hundred and fifty dollars ($950) each, three bonds for every ten shares of stock owned by them respectively (rec. pp. 8, 9).

Inasmuch as it was ultra vires of the savings banks to purchase the bonds as an investment, it was arranged that instead of buying their proportion thereof they should pay the difference between their then market value and the price paid for them by the national bank. The Receiver and the Comptroller knew of the proposed plan of sale to the shareholders and the manner in which the savings banks were to provide for their proportion of the bonds. They also knew that it was ultra vires of the savings banks to purchase such bonds for investment (rec. p. 9).

As we have said the stockholders generally bought the bonds in the manner above referred to. The savings banks gave their checks for the amount required of them pursuant to said plan, to one Ellis who represented the shareholders in carrying out the arrangements with the Receiver. Said checks were endorsed by Ellis to the Receiver. The sums so paid by the savings banks amounted to eighty-two dollars ($82) for each share of national bank stock held by them respectively. By an arrangement between the Receiver and the other shareholders the proportion of the bonds which the savings banks would have taken if they had become purchasers, were sold at their then market value and the proceeds of the sale paid to the Receiver. The net result of the consummation of the above plan was that the Receiver disposed of all his bonds at the price they were bought by the national bank (rec. p. 9).

The Receiver and Comptroller, when the former took the checks of the savings banks as aforesaid, knew the capacity in which Ellis

acted and that the checks were given for the purposes and under the circumstances set forth and without any agreement or obligation on the part of the Comptroller or Receiver that such payments should in whole or in part discharge their liability as shareholders for the debts of the national bank, except so far, if at all, as such agreement or obligation may be lawfully implied from the facts stated in the stipulation and such evidence as might be introduced. The Receiver contends that no such implication is warranted (rec. p. 9).

On July 22, 1902, somewhat more than a month after the sale of the bonds the Receiver, by direction of the Comptroller, sent the following letter to all the shareholders of the national bank:

"Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary" (rec. p. 10).

No further action has ever been taken with reference to said assessment (rec. p. 10).

The proceeds of this sale, together with other assets of the national bank enabled the Receiver to pay 98% of the principal of the Bank's indebtedness (rec. pp. 9, 10).

On December 28, 1906, the Comptroller decided that it was necessary to enforce the individual liability of shareholders to the extent of $49 per share and directed the Receiver to take the necessary steps therefor (rec. p. 10).

In the cross-bill the savings banks seek to have the amounts paid by them on account of the bond transaction applied to the payment of the assessment on their shares and the balance returned to them.

Both cases were submitted to a Master who reported the facts in accordance with a stipulation entered into between the parties and upon evidence offered by the savings banks of the checks showing the payments made by them; the book entry of one of them, and the votes of two of them, relating to their participation in the sale (rec. pp. 3–13).

The cases were submitted upon the Master's report to the District Court, which found in substance that in making their payments in

connection with the bond sale the savings banks understood that they were to be applied in reduction of the first assessment and that the Comptroller and Receiver by their conduct so gave them to understand and tacitly agreed to such application (rec. p. 18). It was found alternatively that if this conclusion was not warranted, the sums so paid to the Receiver were paid under a mistake of fact and in the belief on the part of the savings banks that they were so to be applied. The Court found further that the Comptroller was without authority to withdraw the first assessment and that as that assessment was for one hundred per cent, the second assessment was invalid (rec. p. 18). Final decrees were entered dismissing the cross-bill generally and the original bill as against the savings banks (rec. pp. 1, 2). Both parties appealed (rec. pp. 19–23). The Circuit Court of Appeals held that there was no sufficient evidence to show an effectual withdrawal of the first assessment and accordingly that the second assessment was invalid (rec. p. 28). A decree was entered affirming the decree of the District Court dismissing both appeals (rec. p. 29). Both parties appealed (rec. pp. 41–44). Subsequently the Receiver waived his appeal from the decree in the cross-bill and the savings banks waived their appeal from the decree in the original bill. The cases are before this Court on appeal by the Receiver from the decree dismissing the original bill and on appeal of the savings banks from the decree dismissing the cross-bill.

The main question is the right of the Receiver to enforce the individual liability of the shareholders of the national bank to the extent of $49 per share.

Certain collateral questions are presented by the various assignments of error.

SPECIFICATION OF ERRORS RELIED UPON BY THE RECEIVER.

The Receiver alleges the decree dismissing the bill to be erroneous for the following reasons:

1. Because it denies the right of the Receiver to recover the assessment now sued for with interest.

Because the Court erred in not adjudging and decreeing that the plaintiff was entitled to recover from the savings banks, forty-nine

dollars per share upon the shares held by them respectively, together with interest from January 26, 1907 (Receiver's first assignment of error, rec. p. 31).

Because the Court erred in not finding and ruling that there are no facts disclosed by the record constituting a defense on the part of the savings banks to the Receiver's bill (Receiver's fortieth assignment of error, rec. p. 40).

2. Because it is not held that all the evidence relating to the bond plan including the savings banks' exhibits Nos. 1, 2, 3, 4, 5, and 6 (rec. pp. 32, 33, 34, 35, and 36) should have been excluded.

Because the Court erred in not adjudging and decreeing that the evidence offered by the savings banks that on the 10th day of April, 1902, the Comptroller sent to the directors of the national bank a letter of which the following :—(is a copy)

"The Board of Directors, Pynchon National Bank, Springfield, Mass.

GENTLEMEN: In view of the effort now being made by the directors and stockholders of the Pynchon National Bank of Springfield, Mass. (insolvent) to dispose of to the stockholders a large number of the first mortgage bonds of the American Writing Paper Co., I wish to say to your Board that this will effect a settlement of the affairs of this Bank that will be eminently satisfactory to all interests, and one which I am very hopeful will be accomplished.

I am just in receipt of the report of the special examination of this trust made by an official of this Department sent to Springfield for that purpose, and I am quite satisfied if this sale of bonds is effected the Receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.

I wish further to say that after this examination it is very plain that there will be no escape from an assessment of 100 per cent against the stockholders, if the Receiver had to put up the Writing Paper bonds on the market at 65 or thereabouts.

The Receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95) the trust will pay out in full and I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen,—which of course is highly improbable.

I trust that you gentlemen will use every possible effort to effect this most satisfactory settlement of these matters.

Respectfully, WM. B. RIDGELY,
Comptroller."

that said letter was written by the Comptroller in good faith and with the expectation that it would be, and it was shown to the shareholders including said savings banks; that at the date of said letter and at the time when the Pynchon National Bank was declared to be insolvent the assets of that bank included bonds of the American Writing Paper Company of the par value of $577,000; that said bonds had been purchased by said National Bank; that said letter of the Comptroller related to an effort being made by the Directors, stockholders and

Receiver to procure the purchase from the Receiver of said bonds at the price at which they had been bought by the bank, namely, the sum of $529,150; that said directors and Receiver were then of the opinion that if said purchase price upon said terms could be effected it would provide sufficient funds to enable the Receiver to pay the debts of the national bank in full, thereby obviating the necessity for enforcing the personal liability of stockholders; that the purchase of the bonds at $950 each was consummated under an arrangement entered into by the Receiver with the knowledge and approval of the Comptroller whereby the stockholders generally were to take at the price of $950 each three bonds for every ten (10 shares of the stock of the national bank owned by them respectively; that inasmuch as it was ultra vires of Massachusetts savings banks under the statutes of that Commonwealth, as the Receiver and Comptroller then well knew, to purchase such bonds as an investment it was arranged with the knowledge and approval of the Comptroller and the Receiver that the savings banks instead of purchasing their proportion of the bonds should pay the difference between their then market value and what the national bank paid for them; that the proportion of the bonds which the savings banks would have taken was by agreement between the Receiver and other stockholders sold by the latter at their then market value and the proceeds of such sales paid to the Receiver so that the Receiver retained none of said bonds; that the savings banks did not purchase any of the bonds or receive any consideration or anything of value for their contributions which they however made with the expectation and hope that the bank would thereby be made solvent and their liability as stockholders for its indebtedness would thereby be extinguished; that these payments amounted to $82 per share of the holdings of said savings banks respectively and were made by checks payable to one Ellis who represented the stockholders in carrying out the arrangements with the Receiver and that said checks payable to said Ellis, or order, were forthwith endorsed by him and delivered to the Receiver; that the Receiver and Comptroller then knew the capacity in which Ellis acted and that the checks were given for the purposes and under the circumstances above set forth without any agreement or obligation on the part of the Comptroller or Receiver that such payments should in whole or in part discharge the liability of the savings banks as stockholders excepting so far, if at all, as such agreement or obligation might lawfully be implied from the facts stated in the stipulation entered into between the parties; that the Receiver with the knowledge and approval of the Comptroller retained the payments made as above set forth and applied them toward the payment of the debts of the national bank, and all other evidence relating to said bonds, their sale and the receipt and disposition of the proceeds of such sale contained in said stipulation should have been excluded by the Master on the ground that it was incompetent, irrelevant and immaterial (Receiver's sixth assignment of error, rec. p. 32).

Because the Court erred in not adjudging and decreeing that the evidence offered by the savings banks consisting of six exhibits as follows should have been excluded by the Master on the ground that it was incompetent, irrelevant and immaterial (Receiver's seventh assignment of error, rec. p. 33).

EXHIBIT 1.

Payable if desired at Chase Nat. Bank New York.

SPRINGFIELD, MASS., Jun- 14, 1902. No. 6329.

The Springfield Five Cents Savings Bank

Pay to the order of R. W. Ellis Trustee $9820.00 Ninety eight hundred and twenty dollars.

To the Springfield National Bank, Springfield, Mass.
HENRY D. MARSH,
Ass't Treasurer.

(Endorsed:) R. W. Ellis Trustee. The Pynchon National Bank, Springfield, Mass. by Ellis S. Pepper Rec'r.

EXHIBIT 2.

Payable if desired at the National Bank of Redemption, Boston, Mass.

Springfield Institution for Savings.

$30,360.17. SPRINGFIELD, MASS., June 14/1902.

The Chicopee National Bank of Springfield, Mass.,

Pay to the order of Ralph W. Ellis Trustee, Thirty thousand three hundred sixty & 17/100 Dollars.
JOSEPH C. BOOTH, *Treasurer.*

No. 21223.

(Stamped on face:) The Chicopee Nat'l Bank Springfield, Mass. Paid Jun- 19, 1902.

(Endorsed:) Ralph W. Ellis, Trustee. The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r.

Pay to The Nat'l Exchange Bank, of Boston, Mass., or Order, Springfield National Bank, Springfield, Mass.
RALPH P. ALDEN, *Cashier.*

All Endorsements Guaranteed.
Paying Teller, Boston, Jun- 18, 1902.
Nat'l Bank of Redemption.

Paid through Clearing House, Jun- 18, 1902.
NAT'L EXCHANGE BANK, BOSTON,
C. A. PRICE, *Cashier.*

EXHIBIT 3.

$5,319.17.

Hampden Savings Bank.

SPRINGFIELD, MASS., June 14, 1902.

Agawam National Bank of Springfield:

Pay to the order of Ralph W. Ellis, Trustee, Fifty-three hundred nineteen 17/100 Dollars.

No. 7630.

E. S. BAILEY, *Treasurer.*

(Stamped on face:) Paid June 17, 1902, The Agawam National Bank, Springfield, Mass.

(Endorsed:) Ralph W. Ellis, Trustee. The Pynchon National Bank, Springfield, Mass., by Ellis S. Pepper, Rec'r.

Pay only through the Springfield Clearing House.

June 17, 1902.

To The Springfield Nat'l Bank, Ralph P. Alden, Cashier.

EXHIBIT 4.

The Hampden Savings Bank, Springfield, Massachusetts.
Dwight O. Gilmore, President.
John B. Phelps, Treasurer.

At a meeting of the Board of Investment of the Hampden Savings Bank, held April 26, 1902, the following vote was taken:

"A proposition from Pynchon Bank Directors for us to pay difference between 70 & 95, 25% on 19000 American Writing Paper Bonds in lieu of an assessment of 100% (4,750 instead of 6,500) was referred to F. H. Stebbins with power."

P. S. BAILEY, *Clerk.*

Approved by F. H. S.

I hereby certify that the foregoing is a true copy of the record of a vote of the Investment Committee of the Hampden Savings Bank passed on April 26, 1902.

JOHN B. PHELPS,
Clerk of Investment Committee.

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

January 10, 1914.

Then personally appeared the above named John B. Phelps and made oath that the foregoing affidavit by him subscribed is true before me.

[SEAL.]

FRANK E. CARPENTER,
Notary Public.

EXHIBIT 5.

Springfield Institution for Savings, Incorporated 1827.

Winford N. Caldwell, President; A. A. Packard, Vice-President; John W. B. Brand, Treasurer; Joseph E. Holmes, Ass't Treasurer, Springfield, Mass.

At a special meeting of the Board of Trustees of the Springfield Institution for Savings held May 7, 1902, it was voted:

That the Board of Investment be authorized to enter into an agreement with the receiver and directors of the Pynchon National Bank with a view to the adjustment of the relations of this Institution to that Bank, and to the discharge of its liability as a stockholder of the Bank, in such form as to them shall seem best.

[SEAL.] JOHN W. B. BRAND, *Treasurer.*

A true copy, attest:

_____ _____.

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

SPRINGFIELD, MASS., January 10th, 1914.

Then personally appeared John W. B. Brand, Treasurer of Springfield Institution for Savings, and made oath that the above is a true copy of a vote of the Board of Trustees of said Institution as appears by the official records of said meeting, before me.

[SEAL.] W. MEREDITH WHARFIELD,
Notary Public.

EXHIBIT 6.

Springfield Institution for Savings, Incorporated 1827.

Winford N. Caldwell, President; A. A. Packard, Vice-President; Joseph Shattuck, Jr., Treasurer; John W. B. Brand, Ass't Treasurer, Springfield, Mass.

Profit and Loss.—Paid Ralph W. Ellis, Trustee, to be turned over to Receiver of the Pynchon National Bank, that we may, as is believed probable, thereby avoid assessment of 100% on 371 shares Pynchon National Bank Stock (See vote Trustees May 7, $30,360.17).

I hereby certify that the foregoing is a true copy of the charge made on the cash book of the Springfield Institution for Savings June 30, 1902.

JOHN W. B. BRAND,
Ass't Treas.

March 22, 1909.

3. Because it is not held that there is no sufficient evidence to warrant the conclusions of the District Court, either

(a) that in making their payments under the bond plan the savings banks understood that they were to be applied in reduction of the existing assessment; or

(b) that the Comptroller and Receiver by their conduct so gave them to understand and tacitly agreed to such application, or

(c) that said payments were made under a mistake of fact and in the belief by the savings banks that they were to be so applied.

And further because it is not held that it is immaterial whether they so understood and whether the Comptroller and Receiver so gave them to understand and tacitly agreed to such application or whether said payments were made under a mistake of fact and in the belief on the part of the savings banks that they were to be so applied and because it is not held that the Savings Banks are not now entitled to have their payments applied upon their share of the stockholders liability (op. of District Court, rec. p. 18).

Because the Court erred in not adjudging and decreeing that there was no evidence upon which it was competent for the trial Court to find that any part of the assessment now sought to be recovered has been paid (Receiver's third assignment of error, rec. p. 31).

Because the Court erred in not adjudging and decreeing that there was no sufficient evidence upon which it was competent for the trial Court to find that the amounts paid by the savings banks in connection with the bond plan were gifts or in the nature of gifts (Receiver's fifth assignment of error, rec. pp. 31 and 32).

Because the Court erred in not adjudging and decreeing that there was no sufficient evidence to warrant a finding that there was any agreement or obligation on the part of the Comptroller or Receiver that the payments made by the savings banks, respectively, in connection with the bond transaction should in whole or in part discharge their liability for or on account of the indebtedness of the national bank and any stock assessments against them as stockholders (Receiver's eighth assignment of error, rec. p. 37).

Because the Court erred in not adjudging and decreeing that even if it should be found that there was such an agreement or understanding or obligation (referred to in the 8th assignment) the same did not in any way affect the liability of the savings banks for the present assessment (Receiver's ninth assignment of error, rec. p. 37).

4. Because it is not held that it is immaterial whether any "unlooked for shrinkage" has occurred since the sale of the bonds and the withdrawal of the first assessment.

Because the Court erred in not adjudging and decreeing that the fact that the Comptroller stated in his letter of April 10th, 1902, that "I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen—which of course is highly improbable" and that it did not appear that any unlooked for shrinkage in value of assets subsequently occurred, did not impair or in any way affect the right of the Receiver to enforce the payment of the present assessment (Receiver's tenth assignment of error, rec. p. 37).

5. Because it is not held that said assessment was duly withdrawn and that such withdrawal was in the power of the Comptroller.

Because the Court erred in adjudging and decreeing that there was an incomplete attempt to annul the first assessment (Receiver's nineteenth assignment of error, rec. p. 38).

Because the Court erred in adjudging and decreeing that there was an attempt to annul the first assessment, without adjudging and decreeing that said assessment was thereby annulled so far as necessary to enable the Receiver to maintain his action for the recovery of the present assessment (Receiver's twentieth assignment of error, rec. p. 38).

Because the Court erred in adjudging and decreeing that assessments of 149% would not be valid under the statute, without finding and ruling that the making of the assessments to that extent did not impair the right of the Comptroller to enforce the individual liability of shareholders for the debts of the national bank up to the maximum amount provided by statute (Receiver's twenty-first assignment of error, rec. p. 38).

Because the Court erred in adjudging and decreeing that there ever was an attempt to "invalidate" the first assessment (Receiver's twenty-third assignment of error, rec. p. 38).

Because the Court erred in adjudging and decreeing that the validity or sufficiency of the withdrawal of the first assessment depended wholly or principally on the Comptroller's letter of April 10th, 1902, and the fact that no further attempt was made to enforce that assessment (Receiver's twenty-fourth assignment of error, rec. p. 38).

Because the Court erred in adjudging and decreeing that the action of the Comptroller about not enforcing the first assessment was in pursuance of his letter of April 10th, 1902 (Receiver's twenty-fifth assignment of error, rec. pp. 38 and 39).

Because the Court erred in adjudging and decreeing in effect that with the exception of the Comptroller's letter of April 2, 1902, and the absence of any attempt thereafter to enforce said assessment there was no evidence of any definite action by the Comptroller with reference to that assessment (Receiver's twenty-sixth assignment of error, rec. p. 39).

Because the Court erred in adjudging and decreeing that the duty of the Comptroller in the matter of making or withdrawing assessments upon the stockholders of an insolvent national bank involves a solemn record in his department (Receiver's twenty-seventh assignment of error, rec. p. 39).

Because the Court erred in not adjudging and decreeing that the right of the Receiver under the direction of the Comptroller to enforce by statute the individual liability of shareholders does not depend

wholly or in part upon whether the making of that assessment or the withdrawal of a previous unpaid assessment is a matter of solemn or other record in the Comptroller's department (Receiver's twenty-eighth assignment of error, rec. p. 39).

Because the Court erred in not adjudging and decreeing that the right of the Receiver to maintain his bill is not affected by any question of whether there was any record in the Comptroller's department relating to the withdrawal of the first assessment (Receiver's twenty ninth assignment of error, rec. p. 39).

Because the Court erred in not adjudging and decreeing that the record showed a definite intention on the part of the Comptroller to withdraw the first assessment and definitely to discontinue any further action in connection therewith and that if any formal withdrawal of that assessment was necessary to enable the Receiver to maintain his bill his instruction to the Receiver to send to the stockholders the letter of July 22d, 1902, and the sending of that letter in pursuance of such instruction constituted a sufficient withdrawal (Receiver's thirtieth assignment of error, rec. p. 39).

Because the Court erred in adjudging and decreeing that the enforcement of the first assessment was suspended without adjudging and decreeing that the Comptroller's order to suspend action on that assessment was in connection with the decision on his part to withdraw that assessment which was duly communicated to the stockholders and which showed definitely that no further action would be taken with reference to the first assessment (Receiver's thirty-first assignment of error, rec. p. 39).

Because the Court erred in not adjudging and decreeing that so far as necessary to enable the Receiver to maintain his bill the first assessment was sufficiently and effectually withdrawn (Receiver's thirty-third assignment of error, rec. pp. 39 and 40).

Because the Court erred in not adjudging and decreeing that if anything further was required for a sufficient withdrawal of the first assessment, the same was waived by the savings banks. (Receiver's thirty-seventh assignment of error, rec. p. 40).

Because the Court erred in not adjudging and decreeing that the fact that the assessment of one hundred per cent was made and withdrawn afforded no defense to the assessment now sought to be recovered (Receiver's thirty-eighth assignment of error, rec. p. 40).

Because the Court erred in not adjudging and decreeing that under the circumstances disclosed it was competent and proper for the Comptroller to withdraw the first assessment in the manner adopted by him and his right to levy and enforce the present assessment is in no wise impaired or affected thereby. (Receiver's thirty-ninth assignment of error, rec. p. 40).

6. Because it is not held that it is immaterial whether or not the first assessment was duly withdrawn.

Because the Court erred in not adjudging and decreeing that it was immaterial how many so-called assessments the Comptroller might make or what the aggregate amount thereof might be with reference to the par of the national bank stock or whether one or more of such assessments might be outstanding when the Comptroller decided as

provided by statute that it was necessary to enforce the individual liability of shareholders and directed the Receiver to take the necessary steps for that purpose, so long as no attempt was made to exceed the maximum statutory liability and there was no violation of the provision that shareholders' liability shall be borne equally and ratably and no question of the effect of any statute of limitations is presented. (Receiver's thirty-second assignment of error, rec. p. 39).

Because the Court erred in not adjudging and decreeing that the Receiver is entitled to maintain his bill without reference to whether the first assessment was or was not formally or effectually withdrawn. (Receiver's thirty-fourth assignment of error, rec. p. 40).

7. Because it is not held that it would not have been ultra vires of the savings banks to buy their quota of the bonds and accordingly their participation, which was only another form of coming into the general plan on the same terms as the other stockholders, was within their corporate powers.

Because the Court erred in not adjudging and decreeing that under the circumstances disclosed by the record it would not have been ultra vires of the savings banks to purchase their proportion of the bonds to be taken by the stockholders generally in pursuance of the plan shown therein. (Receiver's eleventh assignment of error, rec. p. 37).

Because the Court erred in not adjudging and decreeing that if it would have been within the powers of the savings banks under the circumstances disclosed to purchase their proportion of the bonds or any part thereof it was lawful and proper for them to contribute in proportion to their holdings of national bank stock to the fund then being raised by the stockholders generally for the purpose of taking the bonds off of the hands of the Receiver at the price they cost the national bank. (Receiver's twelfth assignment of error, rec. p. 37).

Because the Court erred in not adjudging and decreeing that the evidence warranted a finding by the trial Court that what the savings banks did in connection with the bond plan would have been done by a prudent, natural person under like circumstances for the protection of his own interests and therefore was not ultra vires (Receiver's thirteenth assignment of error, rec. p. 37).

8. Because it is not held that even if the savings banks' participation in the bond plan was ultra vires it has been fully executed and they are not now entitled to any relief.

Because the Court erred in not adjudging and decreeing that whether or not what the banks did was in fact ultra vires, the matter was fully executed and completed before the bringing of the original and cross-bills and the savings banks are accordingly not entitled to the relief sought. (Receiver's fourteenth assignment of error, rec. p. 37).

9. Because it is not held that even if the savings banks might ever have been entitled to relief under the original or cross-bill they are now barred by their laches.

Because the Court erred in not adjudging and decreeing that even if the savings banks under any circumstances might have been entitled to relief under the original or cross-bill they are now barred by their laches. (Receiver's fifteenth assignment of error, rec. p. 37).

Because the Court erred in not adjudging and decreeing that the savings banks were estopped by their laches and acquiescence during the period between the letter of withdrawal (July 22, 1902) and the bringing of the original and cross-bills subsequent to the making of the second assessment (December 28, 1906) from claiming that there was no sufficient withdrawal of the first assessment or that any withdrawal thereof was necessary to enable the Receiver to maintain his bill. (Receiver's thirty-fifth assignment of error, rec. p. 40).

10. Because it is not held that it would be contrary to the principles of equity and good conscience to permit the savings banks the relief they seek at the expense of the other stockholders.

Because the Court erred in not adjudging and decreeing that there was good and sufficient consideration, moving from the Receiver and the other shareholders, for the payment by the savings banks of the amounts paid by them in connection with the bond transaction. (Receiver's eighteenth assignment of error, rec. p. 38).

Because the Court erred in not adjudging and decreeing that stockholders other than the savings banks entered into and carried out the plan relating to the purchase of the bonds in the belief that the savings banks were to bear their proportionate share of the expense of restoring the national bank to a condition of solvency, and when they paid their money it was with the understanding and belief that the national bank would receive the benefit from the sale of all the bonds at $950 each and that such belief and understanding were fully justified by the conduct of the savings banks. (Receiver's sixteenth assignment of error, rec. pp. 37 and 38).

Because the Court erred in not adjudging and decreeing that it would not be in accordance with the principles of equity and good conscience to permit the savings banks to recover the whole or any part of the sums paid by them in connection with the bond transaction at the expense of the other stockholders. (Receiver's seventeenth assignment of error, rec. p. 38).

ARGUMENT.

I.

THE COMPTROLLER MIGHT LAWFULLY WITHDRAW THE FIRST ASSESSMENT.

The Receiver contends that there is nothing in the statutes or in the authorities supporting the conclusion of the District Court that the Comptroller might not lawfully withdraw the first assessment and that there is nothing in the history of that assessment affecting his

right to maintain the present action. No question of the statute of limitations is or could be raised.

We have not been able to find any case in which the question of the Comptroller's right to withdraw an assessment is discussed, but we believe his action is within the well established principle that it is for the Comptroller alone to determine when and in what amounts the statutory liability of stockholders shall be enforced, and whether by one or more than one assessment, and that the only limitation upon his authority is that stockholders cannot be compelled to pay more than the par of their stock and that the liability must be borne equally and ratably.

In United States *v.* Knox, 102 U. S. 422, 425, it is said that the process of enforcing stockholders' liability makes it necessary to ascertain (1) the whole amount of the par value of all of the outstanding stock, (2) the amount of the deficit after exhausting all the assets of the bank, (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole deficit as his stock bears to the entire outstanding capital stock, and that all assessments made in accordance with the above rules *successive or otherwise* not exceeding the par value of all the stock of the bank are conclusive upon stockholders.

It is said in Studebaker *v.* Perry, 184 U. S. 258, 268, the *italics* being our own:

"The cases cited by the plaintiff in error wherein courts of high authority have held that, where some particular act involving judicial discretion is to be performed by an executive officer, the power is exhausted by its single exercise, are not applicable to cases like the present, where the law merely provides that the shareholder shall pay what may be necessary to meet the debts and obligations of the bank. How much that is may not be ascertained at once, but as it is important that the settlement shall progress without delay, it is a reasonable construction of the statute that, while it is just and for his benefit that the stockholder be called on for no more than seems to be necessary, so it is just to the creditor that further calls may be made when necessary. This is a case where the power to assess belongs exclusively to the Comptroller, and the power to enforce the assessment belongs to the courts and the construction contended for on behalf of the plaintiff in error confuses the remedy provided for by this statute of the United States with the ordinary remedy for the enforcement of statutory liability of stockholders by the courts.

In the same case on page 268 it is said:

"The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' *and rules of construction are not to be invoked in a way to defeat that purpose,—and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design.*"

It is said on p. 263:

"It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability and whether the whole or a part, and if only a part how much shall be collected. These questions are referred to his judgment and discretion and his determination is conclusive—he may make it at such time as he may deem proper and upon such data as shall be satisfactory to him."

It is well settled that the authority of the Comptroller is not exhausted by levying a single assessment and that stockholders may be compelled to respond by successive assessments so long as the statutory maximum is not exceeded.

Aldrich *v.* Yates, 95 Fed. 78
Deweese *v.* Smith, 106 Fed. 438
Studebaker *v.* Perry, 184 U. S. 258

The only authority cited by the District Court is Studebaker *v.* Perry, *supra*. The first paragraph of the syllabus is as follows:

"The Comptroller of the Currency is authorized to make a second assessment upon the shareholders of an insolvent national banking association, where the first assessment proves insufficient to pay the debts and liabilities of the bank, by U. S. Rev. Stat. § 5234, empowering him, if necessary to pay the debts of such association, to enforce the individual liability of its shareholders, which, by § 5151, is measured by the par value of their stock in addition to the amount invested therein, so long as both assessments do not exceed that amount.

However, the question presented in the case at bar did not arise in that case and the language "so long as both assessments do not exceed that amount" is used with reference to an assessment already paid and one sought to be recovered, the aggregate of which did not exceed the statutory liability.

The stockholders in that case resisted the attempt to collect a second assessment on the ground that the Comptroller's authority was exhausted by levying one assessment. This Court held the law to be otherwise. The *italics* in the following quotation from the opinion are our own:

"The general purpose of the statute undoubtedly was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the amount of their stock therein, and *it would be a singular construction of law that would empower the Comptroller, by making an inadequate assessment, to relieve the shareholders, upon paying such assessment, from their entire liability.*

The logic of the plaintiff in error requires him to convince us that his voluntary payment of one assessment, made when the Comptroller was imperfectly acquainted with the amount of the bank's indebtedness, amounts to a satisfaction *in toto* of his obligation. Such may be the true construction of the statute, *but defeating as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language.* The inconveniences that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

If it be the duty of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he must, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up and then be returned without interest would certainly be a hardship upon the shareholders. If to avoid that hardship the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings and thus a loss be thereon upon the creditors.

There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences" (pp. 261, 262).

The inconveniences and disadvantages to shareholders and creditors are not less serious in the present case than in the Studebaker case. Here it was the duty of the Comptroller to proceed promptly to collect the assets of the bank, enforcing the individual liability of shareholders if necessary, to the end that the creditors might be paid and its affairs wound up as expeditiously as possible. Shortly after the appointment of the Receiver it appeared to the Comptroller that the full shareholders' liability would have to be enforced. It then became his duty to put in motion the machinery for that purpose, which he did. A little later by reason of a change in the condition of the bank, which was not and could not have been foreseen, but

which was brought about largely by the shareholders themselves for their own benefit, it appeared improbable that it would be necessary to enforce this personal liability to any extent whatever. Plainly it was to the advantage of shareholders that this assessment should be withdrawn and its withdrawal could not injure them. And yet if the rule adopted by the District Court is the true interpretation of the statute, and it ever became necessary to enforce the individual liability of shareholders, the Comptroller would have been compelled to proceed under the one hundred per cent assessment and however small the amount then apparently necessary, he must collect the entire one hundred per cent and hold it without interest until the amount actually required should be definitely fixed. He could not resort to a suit in equity in which an interlocutory decree for contribution might be entered and the case stand over until it should be determined whether further assessments would be necessary.

Kennedy *v.* Gibson, 75 U. S. 498

It is altogether unlikely that the stockholders would have bought the bonds if they had not understood that the then existing assessment would be withdrawn, or if they had understood that if it ever became necessary to enforce their individual liability to any extent whatever, the Comptroller was bound to enforce it to the full extent, holding their payments until the amount required should finally be determined. So far as the general application of the rule is concerned this is unimportant. A much stronger case may be imagined. Let us suppose a case where pending a one hundred per cent assessment shareholders had evolved a plan which was expected to yield a sufficient sum to pay a large part of the bank's indebtedness but that it was clear that a small assessment would have to be paid. In such case if the rule of the District Court is the true one the Comptroller would have no alternative but to proceed promptly to enforce the maximum statutory liability of shareholders and to hold their payments without interest possibly for years until it should be determined with certainty just how much would be required. The important thing is that if this rule is to prevail it takes away the inducement to shareholders by lawful means to make any effort to save in whole or in part their individual liability, through a process of increasing the bank's assets, thereby expediting the payment of its debts and the winding up of its affairs.

Obviously it was to the great advantage of the creditors of the national bank that its assets should be increased by the sale of the bonds at approximately one hundred and sixty-four thousand dollars ($164,000) over the then market value, thereby making good a loss which it may be assumed was largely responsible for the failure of the bank. Shareholders believed that it was to their own advantage as well, and were ready to buy them on the terms stated. They knew from the Comptroller's letter in which he said "I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked-for shrinkage in value of assets should happen—which of course is highly improbable," (*supra* 2, rec. p. 8) that he did not undertake to relieve them of their shareholders' obligation in the event it became necessary to enforce it to any extent. They doubtless knew that he could not lawfully relieve them from this obligation in consideration of their purchase of the bonds. No one will doubt, however, that they wanted this assessment withdrawn and expected it would be.

Granting as we must that it was greatly to the advantage of the shareholders, without prejudice to the creditors, and altogether within the spirit and intent of the statute, for the Comptroller to do with reference to the first assessment exactly what he did do, upon what theory can it be successfully urged, in the absence of any specific prohibition in the statute, or any language from which such prohibition may be implied, that the construction given by the District Court is "compelled by the necessary meaning of the language"? On the contrary is not the construction contended for by the Receiver to be given in order to accomplish the "main and obvious purpose of the enactment"? Is it not clearly a case where rules of construction are not to be invoked in a way to defeat the "dominant purpose of the statute," and where "by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design." Studebaker *v.* Perry, *supra*.

It is submitted that there is nothing in the statutes or in the precedents to warrant the conclusion that the Comptroller is without authority to withdraw an assessment when by reason of a change in the condition of the bank, occurring after the assessment was ordered, he is of the opinion that no assessment will be necessary; and that such

withdrawal does not impair his right to enforce the statutory liability of shareholders, if and whenever it becomes necessary to do so.

II.

THE FIRST ASSESSMENT WAS EFFECTUALLY WITHDRAWN.

Without passing upon the question of the right of the Comptroller to withdraw the first assessment the Circuit Court of Appeals decided that there was no sufficient evidence that what was done amounted to a withdrawal and that as the two assessments could not stand together the second assessment was invalid (rec. 26–29). Accordingly a decree was entered dismissing the Receiver's bill. After stating that in the matter of assessments the duties of the Comptroller are quasi judicial and involve an accounting and a solemn record in his department, the Court goes on to say that the only evidence of a withdrawal was the Comptroller's letter to the directors, in which he expressed the hope that the bond plan would succeed and his conviction that if it did no assessment would be necessary, together with the fact that no further action was taken with reference to that assessment (*supra* 2, rec. p. 8).

We find great difficulty in understanding why the Court proceeded on the theory that the Receiver's contention that the first assessment was withdrawn was based at all upon the Comptroller's first letter above referred to. The letter states very plainly that in his opinion unless the bond plan succeeds shareholders will have to pay the assessment in full. Obviously the thing that it was hoped would dispose of the existing assessment had not yet happened. Whether it ever would happen the future alone could show. Nothing could have been further from the Comptroller's mind than that that letter should, or should be thought by shareholders, to be a withdrawal of the then existing assessment.

Nor is it easy to see how the Court came to disregard the Receiver's letter sent to shareholders by order of the Comptroller shortly after the bonds were sold.

"Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been

instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary" (*supra* 4 rec. p. 10).

or how in the light of that letter it should appear that beyond the Comptroller's letter

"we find nothing further in the record nor in the opinion of the District Court which shows any definite action with reference to the first assessment" (rec. p. 28).

The letter last above quoted is not mentioned in the opinion of the Court of Appeals.

Assuming that it was within the power of the Comptroller by some proper process to withdraw the assessment, we have to consider what was requisite for that purpose.

So far as we are aware it has never been held that the right to enforce the individual liability of shareholders depends upon any solemn or other record in the Comptroller's department. Certainly the statutes relating thereto contain nothing of the kind, nor does such a requirement appear from the cases cited by the Court of Appeals in that connection. (Kennedy *v.* Gibson, 8 Wall 498, 505; Bushnell *v.* Leland, 164 U. S. 684; Studebaker *v.* Perry, 184 U. S. 258, rec. p. 28.)

Moreover it is well settled that no particular formality is required as a foundation for a suit against shareholders. All that is required is the decision of the Comptroller that it is necessary to enforce their personal liability and a direction to the Receiver to take the necessary steps.

Kennedy *v.* Gibson, *supra*
Germania Bank *v.* Case, 99 U. S. 628
Brown *v.* Ellis, 103 Fed. 834
Casey *v.* Galli, 94 U. S. 673
Bowden *v.* Johnson, 107 U. S. 251

In the case last above cited objection was made to the sufficiency of the proof that the Comptroller had decided before suit was brought that it was necessary to enforce the personal liability of stockholders. It appeared that the Receiver produced a letter from the Comptroller instructing him to enforce the whole of their personal liability. It is

said in the opinion that no requirement of further proof was made and it was held that this letter was a sufficient foundation for the suit. In this connection it is to be observed that at the trial in the District Court no ruling was requested that the proper steps had not been taken to effect a withdrawal of the first assessment (rec. pp. 13 and 14). The only request upon that branch of the case was for a ruling that the second assessment was invalid because the first assessment could not lawfully be withdrawn or suspended until the national bank became solvent (rec. p. 13); nor was any error assigned by the savings banks based upon the failure of the Court to rule that proper steps had not been taken to withdraw the first assessment (rec. p. 22). Moreover the cross-bill is brought to have the payments made by the savings banks in connection with the bond transaction applied to the assessment. (rec. p. 10).

When the Comptroller directed the Receiver to notify shareholders that he had decided to withdraw the assessment, it seems to counsel that the Court, in the exercise of its right to draw such inferences of fact from the facts stated in the stipulation as may be competent under the rules of evidence (rec. p. 6), can draw no inference inconsistent with his having in fact so decided. Assuming that he had so decided and had seen to it that stockholders were duly notified of his decision it seems to us that nothing further was required to make the withdrawal effective.

We are unable to see how it may be fairly argued that any greater formality is required to stop an assessment than to start one.

It may be suggested that the word "suspend" indicates that the withdrawal was intended to be temporary rather than permanent and that it should be inferred that it was the purpose of the Comptroller to reserve the right to enforce the then existing assessment at some future time; but it will be observed that he did not "suspend" the assessment; his decision to withdraw it is stated in clear and unambiguous terms. The "suspend" refers only to the conduct of the Receiver after the withdrawal.

If the sentence containing this word had been omitted altogether there would be no possible room for argument that there was anything temporary about the withdrawal. It is to be remembered that nothing had happened with reference to the first assessment except the decision to enforce shareholders' liability to the extent of the par of their stock

and a notice to them of the date when the assessment was payable. No suit had been commenced and after the withdrawal by the Comptroller, the Receiver was powerless to take any action with reference to the enforcement of that assessment. The Comptroller's direction which is an indispensable element to the maintenance of any action would be lacking. There can be no doubt that if any suit had been brought on that assessment it must fail because the withdrawal of the assessment would be entirely inconsistent with the Comptroller's decision that an assessment was necessary and his instruction to the Receiver to commence an action to enforce its payment. It appears then that this instruction was entirely superfluous, and it is of no consequence that the announcement of the withdrawal was accompanied by the statement that the Receiver had been directed to "suspend," rather than in some form of language, forever to refrain from any action to enforce its payment.

Without going into nice distinctions of definition the word "suspend" does not necessarily mean something of temporary character and it is obvious from the context and the surrounding circumstances that this letter was not intended to convey any such meaning.

It will be remembered that at the time this letter was written the assets of the bank had been increased by a sale of bonds by approximately $164,000.00. The Comptroller had written stockholders that the report of a special examiner sent to the bank for the purpose and the examination of the Receiver himself had quite satisfied him that the sale of the bonds at what they cost the bank would enable the Receiver to pay its obligations in full within a very few months. It cannot be supposed that he had any idea that he would still have to enforce the maximum liability of shareholders. Of course he had no right by withdrawing the assessment to discharge shareholders from their statutory liability, and it was entirely natural and proper for him to accompany his notice with the statement that the withdrawal was made without prejudice. Satisfied as he was, however, that the likelihood of ever having to enforce stockholders' liability to any extent whatever was very remote, it is absurd to suppose he had in mind the possibility of commencing actions at law against all the shareholders as he would have been obliged to do to recover what in his opinion would at most be a very small part of their maximum liability (Kennedy v. Gibson, *supra*).

It is obvious that after the withdrawal there could be no enforcement of stockholders' liability without a new decision of the Comptroller that it was necessary, and it cannot be supposed that he had it in mind by some process or other to revive the old assessment when he had no idea that anything like that amount would be necessary, and the simple and natural way would be to order a new assessment for the amount required, if and when it should turn out that more funds were needed.

Nor is it supposable that the shareholders having fresh in their minds his assurance that the necessity of having to enforce their liability to any extent was highly improbable inferred from his letter that he was undertaking to reserve the right to enforce an assessment which he stated in plain language he had decided to withdraw, or that there was any doubt on their part that the only reservation he intended to make was the right to levy and collect such other assessments if any as might thereafter become necessary. It will not be doubted that shareholders wanted the assessment withdrawn and expected it would be, and that they looked upon his letter as an announcement that he had done the very thing that they expected him to do.

If otherwise there might be any doubt as to the meaning of the Comptroller's letter the use of the word "levy" disposes of it as it shows conclusively that the "assessment or assessments" which he reserved the right to "levy and collect" did not include the existing assessment which had already been levied.

III.

IT IS IMMATERIAL WHETHER THE FIRST ASSESSMENT WAS WITHDRAWN.

That part of Sec. 5151 of the Revised Statutes providing for shareholders' liability is as follows:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Sec. 5234 provides for the appointment of a Receiver and that

"such Receiver, under the direction of the Comptroller * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

This is the sum total of statutory enactment providing for the individual liability of shareholders of a national bank and the means of enforcing it.

The term "assessment" is not anywhere mentioned in the statutes relating to stockholders' liability.

It would be difficult to find a statute more clearly showing the purpose of Congress to express itself in plain and unmistakable language and to make the accomplishment of the main purpose of the enactment less liable to failure.

The Receiver contends that aside from any question of the statute of limitations, which is not involved in the present case, if the payment of any assessment sought to be recovered does not exceed (with sums already paid) the maximum provided by statute and does not violate the rule that shareholders must respond equally and ratably, it is immaterial how many assessments may have been ordered or whether the aggregate amount thereof exceeds one hundred per cent or whether previous assessments have been withdrawn formally or otherwise.

As we have seen the courts have repeatedly declined to hold that the Comptroller's authority is exhausted by the levying of a single assessment.

Deweese *v.* Smith, 97 Fed. 309
Same *v.* Same, 106 Fed. 438

In the case just above cited, and in many others to the same effect, courts have been asked to hold that the payment of a part of the stockholders' liability exhausted the authority of the Comptroller. So far as we have been able to learn this is the first time the court has been asked to hold that the ordering of an assessment by the Comptroller, upon which no suit has been brought and on account of which nothing has been paid, exhausts his authority to enforce the individual liability of shareholders.

We have already referred to the distinction pointed out by this Court between the remedy provided by statute in national bank cases and the ordinary remedy for the enforcement of statutory liability of stockholders by the courts. Studebaker *v.* Perry, *supra*. 18.

The liability of shareholders for the debts of a national bank is tutory and is enforcible whenever the Comptroller decides that forcement is necessary.

McClaine *v.* Rankin, 197 U. S. 154

In Studebaker *v.* Perry, 102 Fed. 947, 949 quoted in the opinion this Court in the same case 184 U. S. p. 268, it is said:

"Under the direction of the Comptroller the Receiver is authorized enforce the shareholders' liability; but the power to enforce does t include a power to *cut off or limit* and by no proper application of neral rules of construction can the statute be so read as to permit e failure of its main design."

It cannot be that creditors must lose the benefit of the statute, lely by reason of the fact that the Comptroller, having previously cided that it was necessary to enforce the maximum liability of areholders, later, because of a change in the condition of the bank ought about by the stockholders themselves, making it appear that e necessity had passed, recalls that decision, stating in his notice to em of what he has done, that it is without prejudice to his right take further action in the premises should the occasion therefor ise.

IV.

THE DECISION OF THE COMPTROLLER AS TO THE NECESSITY OF AN ASSESSMENT IS CONCLUSIVE.

In the opinion of the Court of Appeals it was said with reference the assessment now in suit

"subsequently, for reasons which were not explained to us it was ought necessary to make this other assessment of forty-nine dollars r share." (rec. p. 28).

There was no occasion for the Comptroller or Receiver to explain e reasons leading up to the present assessment. Subject to certain ell defined limitations, none of which are applicable to the present assessment, the decision of the Comptroller is conclusive.

Kennedy *v.* Gibson, 75 U. S. 498
Casey *v.* Galli, 94 U. S. 673

V.

THE SAVINGS BANKS ARE NOT ENTITLED TO HAVE THE PAYMENTS MADE BY THEM UNDER THE BOND PLAN APPLIED IN REDUCTION OF THEIR STATUTORY LIABILITY.

While it is conceded that there was no express agreement that the sums paid by the savings banks should be applied in reduction of the first assessment (rec. p. 9) the District Court found that the savings banks understood that they were to be so applied and that:

"The Comptroller and Receiver by their conduct so gave them to understand and tacitly agreed to such an application." (rec. p. 18).

Inasmuch as it was ultra vires of the savings banks to buy the bonds as an investment it was arranged, that *instead* of buying their proportion they should pay the difference between their then market value and what the national bank had paid for them; that by an arrangement with the other stockholders the bonds that would have gone to the savings banks had they become purchasers were sold on the market.

It appeared further that all this was with the knowledge and approval of the Comptroller.

This is the extent of the part played by the Comptroller and Receiver in the inducement that led to the participation of the savings banks in the sale of the bonds.

It appears that there was no agreement or obligation on the part of the Comptroller or Receiver that the payments made should in whole or in part discharge the statutory liability of the savings banks except so far, if at all, as such agreement or obligation may lawfully be implied from the other facts stated. (rec. p. 9).

The Receiver contends that there is nothing in the agreed statement even suggesting the existence of any such agreement, express or implied, or any conduct on his part or that of the Comptroller from which such an understanding may be inferred, or that either "tacitly agreed to such an application" (rec. p. 18).

It appears that the savings banks made their contributions

"with the expectation and hope that the bank would thereby be made solvent and that their liability as stockholders for its indebtedness would thereby be extinguished." (rec. p. 9).

but if they understood that they were making their payments on account of the assessment, they also understood that such payments would, as a matter of law, extinguish their liability *pro tanto* and it was immaterial whether or not the solvency of the Bank was restored.

It would be doing violence to the agreed statement as a whole to say that the clause just quoted means that while they understood their payments were to be applied on the existing assessment, their hope and expectation for the restored solvency of the bank and the resulting extinguishment of their liability referred only to their stockholders' liability in excess of eighty-two dollars per share.

It is not intimated in the opinion of the District Court that the payments made by the savings banks were connected in any way with the bond plan (rec. p. 16-18). There can be no doubt, however, that such is the fact. The plan was to sell the bonds to all the stockholders. It was accomplished by selling to the stockholders generally, at the advanced price, three bonds for every ten shares of national bank stock owned by them respectively. Inasmuch as it was ultra vires of the savings banks to purchase the bonds *as an investment* it was arranged that they should carry out their part of the plan in a manner slightly different in form, but not at all different in substance. There is no pretense that this form was resorted to because it would have been ultra vires of the savings banks to buy their quota of the bonds as a part of the general plan to diminish a threatened loss. It appears, however, that because they could not buy the bonds as an investment they decided not to buy them at all, and that as a result they made an arrangement—not with the Comptroller or Receiver, but with their knowledge and approval—and so obviously with the other stockholders, that *instead* of buying bonds they should pay the difference between their then market value and their cost to the national bank. It does not appear to whom the arrangement called for the payments to be made. It does appear, however, that they were in fact made to one Ellis who represented the stockholders in carrying out the arrangements with the Receiver. Ellis represented all the stockholders.

Nothing could be plainer than that the participation of the savings banks was part of, and was understood by themselves and all the other stockholders, to be a part of the general plan to relieve the Receiver of his entire holdings at the advanced price in the hope of escaping the

assessment, and that the entire expense, whether in the form of purchase or otherwise, was to be borne equally by all. (rec. pp. 8 and 9)

If the savings banks had the right to purchase their quota of the bonds, in order to save a threatened loss growing out of a legitimate banking transaction, of which we believe there is no doubt (infra p. 34), it is inconceivable that the other stockholders, however confident they were that the accomplishment of the plan would restore the solvency of the bank, would have agreed to so unequal an arrangement. But if the savings banks, owners of more than 25% of the entire capital stock of the national bank (rec. p. 7) had declined to go into the plan upon any other basis than the payment by them upon the outstanding assessment, in proportion to their national bank stock, of the exact sums paid for their bonds by the other stockholders in excess of the market price, no one will suspect that the plan would ever have been carried out.

It is clear from the Comptroller's letter (*supra* p. 4) that it was not a payment on account of the assessment, but a large increase in the assets of the bank from the sale of the bonds that had happened. If the savings banks then learned for the first time that what they had understood to be payments on the assessment were not so at all, and that no other stockholders had paid anything on account of the assessment and never would, the assessment being withdrawn, but that on the contrary the Comptroller was asserting his right to make further assessments if they became necessary, we should expect to find that they promptly called to the attention of the Receiver or Comptroller, or both, the fact that they had paid eighty-two dollars per share upon an assessment, and that inasmuch as other stockholders had been relieved of any obligation on account of that assessment, they demanded that their payments be refunded. Of course we are not unmindful that it was of no consequence to the banks upon what account their payments were credited if their personal liability was extinguished; but if they actually believed that the payments "were to be applied in reduction of that assessment" (rec. p. 18) it is very hard to understand why nothing was heard from them after they were informed that the assessment had been withdrawn and discovered that nobody but themselves had paid anything on it.

If we construe the decision of the District Court to mean that the savings banks, while they did not understand that their contributions

were, in the strict sense, payments on account of the assessment, but rather that under the circumstances they were entitled to have them so applied, this will not avail them, inasmuch as there is nothing to show that they were led into their mistake by any misrepresentations on the part of the creditors of the national bank. Delano v. Butler, 118 U. S. 634

NOTE: It is said in the opinion of the Court of Appeals that "creditors of the Bank and perhaps some others" arranged to take up the bonds (rec. p. 27). This is probably an inadvertence. The creditors had nothing to do with the bond plan. The same language appears in the report of the case 218, Fed. 814, 815.

We do not understand upon what the District Court based its conclusion that the Comptroller and Receiver "tacitly agreed" that their payments should be applied on the assessment. Certainly if in making these payments the savings banks said nothing about the fact that they were being made on the assessment, and if the Comptroller and Receiver had no reason to suppose they intended to make them on account of that assessment, there was no occasion for their saying anything and there is nothing significant in their silence.

No question is made of the good faith of the Comptroller (rec. p. 8) and there is no evidence from which bad faith on the part of the Receiver can be inferred, but even if we infer that the savings banks were led into their mistake by reason of any misrepresentation by the Comptroller or Receiver, their position is no stronger.

Scott *v.* Deweese, 181 U. S. 202, 213

Nor is there any basis for the conclusion that these payments were made under a mistake of fact. As we have seen, the stockholders were considering whether they would buy the bonds of the Receiver at what they cost the bank. We find in the records of the Hampden Savings Bank for example:

"A proposition from Pynchon Bank Directors for us to pay difference between 70 & 95, 25% on 19,000 American Writing Paper Bonds in lieu of an assessment of 100% (4,750 instead of 6,500) was referred to F. H. Stebbins with power" (*supra* 9 rec. p. 12).

As they could not buy the bonds as an investment they arranged with the other stockholders that *instead* of buying their quota they should pay the advance over the market value. The arrangement was carried out by making payments on that basis to "Ellis Trustee"

(*supra* 8 and 9 rec. 10 and 11). If the savings banks had paid for their share of the bonds, even though they had immediately sold them, they would have carried out their arrangement with the other stockholders. For reasons satisfactory to themselves they preferred to arrange with the other stockholders that instead of buying their share they should perform their part of the arrangement by the payment of a sum precisely equal to the advance over the market price paid by the other stockholders. Accordingly they gave their checks to their common representative. Following this their share of the bonds was sold at the market price. Of course they knew that their share of the bonds would be sold on the market forthwith. The plan contemplated the disposal of all the bonds. It will not be suspected that when they gave their checks to the general agent of the stockholders they were ignorant of the fact that they were to be used in connection with the plan to dispose of all the bonds at what they cost the bank. The net result of the whole thing was that the Receiver sold all his bonds at a large increase over the market value and that the cost was borne equally by all stockholders. The difference in participation was merely one of form. The agreed statement does not contain any suggestion that there was any mistake of fact on the part of the savings banks. The nearest thing to it is the intimation that an agreement or obligation on the part of the Comptroller or Receiver may be lawfully implied from the facts stated in the stipulation (rec. p. 9). This however falls far short of any statement of the existence of a possible mistake of fact; nor is there anything in the agreed statement from which the existence of such a mistake may be inferred. The most that can be said is that they may have participated in the bond plan in the belief that such participation would operate, to the extent of their payments, as a discharge of their liability as shareholders. If there was any mistake it was not a mistake of fact but of law.

We may fairly infer that the management of the savings banks was in the hands of men of the average experience and business intelligence usually found at the head of financial institutions of this kind, and that these officers fully realized the significance of the one hundred per cent assessment. It will not be doubted that if what they were undertaking to do was to make payments of eighty-two dollars per share upon their respective stockholders' liability, they were not

ignorant that the simple and direct way to do it was to make their checks payable to the Receiver, to accompany their delivery with the statement that they were given to be applied on the assessment, and ask for his proper receipt. If what they intended to do was to make payments on the outstanding assessment there can be no pretense that any good reason existed for its not being done in the ordinary and usual way. Nor will it be thought, that in such important matters as the payment of sums ranging from five to thirty thousand dollars, which it is said they intended to have applied on the outstanding assessment, but which, nevertheless, they were proposing to make in such a way that no one would suspect their purpose, they would fail to seek the advice of competent counsel. If we are persuaded that the officers themselves were inclined to be satisfied that the "tacit agreement" of the Comptroller and Receiver offered adequate protection, it is incredible that counsel should not have advised them to make their payments in a way that would leave their legal effect free from doubt. It has not been suggested, and we are far from intimating now, that the banks had any intention to mislead the other stockholders or anybody else as to the legal effect of their method of participation in the bond plan. On the contrary we think it is very clear that the bond plan from beginning to end was conceived and carried out with perfect candor on the part of everybody concerned. But this only emphasizes the fact that if it was the purpose of the banks to make payments on account of the outstanding assessment, there is no possible reason why they should not have gone about it just as the average man does when he starts out to pay a bill.

VI.

THE EVIDENCE RELATING TO THE BOND PLAN SHOULD HAVE BEEN EXCLUDED.

If the participation of the savings banks in the bond plan does not affect their liability to pay the present assessment, it follows that all the evidence relating thereto is immaterial. We concede, of course, that to support the claim that their payments ought to be applied on their shareholders' liability, the evidence of those payments and the circumstances under which they were made was competent and material. We contend, however, that the vote of the Hampden Savings Bank (ex. 4 rec. p. 12) and the Springfield Institution for Savings

(ex. 5 rec. p. 12) and the entry in the cash book of the latter (ex. 6 rec. p. 13), not having been made in the presence of the Comptroller or Receiver or ever brought to their notice were clearly incompetent (supra 8–10).

VII.

THE PARTICIPATION OF THE SAVINGS BANKS IN THE BOND PLAN WAS WITHIN THEIR CORPORATE POWERS.

It is conceded by the Receiver that the bonds in question are not included in the securities in which Massachusetts savings banks may ordinarily invest their funds.

We contend that they might lawfully have purchased their proportion of the bonds in order to save a threatened loss growing out of a legitimate banking transaction.

The authority of a corporation to make any contract reasonably adapted to its business, unless restrained by its charter or the statutes of the state under which it is organized, is implied. Its contracts are presumed to be intra vires until the contrary is made to appear. The burden is on him who alleges the contract to exceed the powers of a corporation.

> Southern Ex. Co. *v.* West N. C. R. R. Co., 99 U. S. 191
> Ohio etc. R. R. *v.* McCarthy, 96 U. S. 258

In Old Colony R. R. *v.* Evans, 6 Gray 25, the Court, after referring (p. 38) to the very general powers under which the principles of the common law attach to corporations, proceeds:

"Corporations clearly have power to make all contracts that are necessary and useful to enable them to carry on the business or accomplish the objects of their incorporation."

In Morville *v.* Amer. Tract. Soc., 123 Mass. 129, 136, 137, it is said:

"The power to make all such contracts as are necessary and useful in the course of the business or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter * * * * It must be treated as valid unless it appears affirmatively to be a contract to do something which is beyond the reasonable exercise of the power granted."

It is held in Dupee *v.* Boston Water Power Co., 114 Mass. 37, 43, that

"In the absence of legislative provisions to the contrary a corporation may hold and sell its own stock and may receive it in pledge or in payment in the lawful exercise of its corporate powers."

In Howe *v.* Boston Carpet Co., 16 Gray 493, it was held that corporations had the right to take the stock of another corporation in payment of a debt.

In Kelley *v.* Biddle, 180 Mass. 147, 149, it is said:

"There is no doubt that the corporation, as a creditor of the insolvent might make any reasonable and proper arrangement not in violation of law to make its loss as small as possible."

For the purpose of collecting a debt, or discharging or reducing a liability against it, growing out of a legitimate banking transaction, a bank may purchase or otherwise take property which it would not have the right to buy solely for investment.

Morse on Banks and Banking (4th Ed.) Vol. 1 Sec. 60

Cockrill *v.* Abeles, 86 Fed. 505, 511

It was held in First National Bank *v.* Nat. Ex. Bank, 92 U. S. 122, that a national bank might pay a larger sum that would have been exacted in satisfaction of a demand against it, in consideration of the transfer to it of certain railroad and mining stocks, it being honestly believed at that time that by turning the stock into money later a loss might be averted or diminished. It was pointed out that, excepting so far as they are restrained by charter or by-laws, banks may do in that behalf whatever natural persons might do under like circumstances. It was conceded that the bank had no right to buy the securities in question for investment.

Massachusetts savings banks stand on the same footing as business corporations in general.

"In all essential features of their organization savings banks are, like all other corporations, creations of the law for the more convenient transaction of business to be done by them. They are capable of corporate action and like all other corporations are liable for their corporate action * * * In their business transactions with individuals they are subject to the same rules of law as other corporations or individuals."

Reed *v.* Home Savings Bank, 130 Mass. 443, 446

Chapter 113, Sec. 26, Subdiv. 10 of the Revised Laws of Massachusetts in force at the time of the bond transaction provides that savings banks

"May hold stocks, bonds or other securities acquired in settlements effected to secure loans or other indebtedness, but unless the time during which such securities may be held is extended as provided in the preceding paragraph they shall be sold within five years after being acquired."

Subdiv. 9 provides that the Commissioner of Savings Banks may upon petition for good cause shown, grant an additional time for sale of such securities. Except as it fixes a limit upon the time during which such securities may be sold, this provision seems to be nothing more than an affirmation of the common law. Without the statutory enactment it would always be questionable how long the banks would be warranted in holding the kind of securities mentioned. If the statute is not in terms applicable to the particular circumstances of the present case, it is important as showing that it is well recognized in Massachusetts that occasions will arise when it is desirable for savings banks to take and hold securities in which they may not ordinarily invest their funds. It has the added importance of being the only restriction imposed by statute upon the right of savings banks, for the purpose of saving a loss, to take and hold securities which they may not buy purely for investment.

Obviously there is no distinction in principle between taking property to secure a loan and taking it for the purpose of saving a threatened loss:

"It is difficult to see how a debt due from or a contested obligation resting upon a bank occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances."

First Nat. Bank *v.* Nat. Ex. Bank, 92 U. S. 122

We have not overlooked the fact that in First Nat. Bank v. Converse, 200 U. S. 425, it was held that a national bank had exceeded its powers by joining with other creditors of a failed corporation to organize and take stock in a new corporation, the purpose of which was to acquire the capital stock, evidences of indebtedness and assets of their debtor, and to manufacture and sell various kinds of implements and machinery; and that it was not estopped from setting up its ultra vires act in a suit brought against it by the receiver of the corporation to recover the double stockholders' liability provided by a Minnesota statute.

It was argued that what the bank did was no more than to take property for the purpose of saving a loss and accordingly was within its implied powers.

The Court, however, did not accept that view but held that what it did was to organize and take stock in a speculative venture and that by so doing it exceeded its corporate powers.

It is apparent that there was no intention to qualify the principle in First Nat. Bank *v.* Nat. Ex. Bank, *supra* that case being cited in the Converse case on another point.

An obvious distinction between the Converse case and the one at bar lies in the fact that buyers of the bonds did not in any way become engaged in the business carried on by the American Writing Paper Company. Under no circumstances could their ownership impose upon them any liability for the obligations of the corporation. For the purpose of reducing their loss the stockholders in the present case merely bought property unencumbered by any contingent liability. The speculative element is entirely lacking.

Merchants Nat. Bank *v.* Wehrmann, 202 U. S. 295

Having in mind these general principles it is pertinent to consider the situation of the savings banks at the time in question.

The national bank was in insolvency. An assessment of 100% had been ordered and was outstanding. There was every reason to expect that unless something was done to help the situation the full assessment would have to be enforced. In this state of things the stockholders, in the hope of saving a part of their loss, had under consideration a plan to buy the bonds at what they cost the national bank. The Comptroller knew what was being done. It appears that after a careful investigation of the condition of the bank he was satisfied that if the bond plan succeeded no assessment would be necessary. On the other hand it was very plain to him that unless the Receiver could sell his bonds at what they cost the bank there would be no escape from the outstanding assessment. These conclusions were duly communicated to the stockholders, including the savings banks (rec. pp. 7 and 8 *supra* 2). Whether the stockholders made any independent examination does not appear. Doubtless they would have been given full opportunity if they so desired. Indeed they might have done so as a matter

of right. Guthrie *v.* Harkness, 199 U. S. 148. It may be inferred that they either made their own examination or were satisfied to rely upon that made by the Receiver and special examiner.

It is to be borne in mind that, aside from the plan under consideration, there was no certainty that the Receiver would promptly dispose of his bonds at no less than the current market price, and as a result the national bank's loss, so far as its purchase of the bonds was concerned, would be limited at least to the difference between that price and the original purchase price. If in any event there was to be a quick sale of the bonds at the market price, the national bank, with an addition to its assets equal to the difference between that price and the purchase price, would be no less able to pay out in full, without reference to whether they were sold to shareholders or others. In that case there would have been no bond plan. Even if it be assumed that a part of the inducement to go into the plan was the hope of diminishing their loss through a future increase in the value of the bonds, the result is the same, because they would have preferred to buy their bonds at the market price, seeing to it that whatever they invested above that price was applied in payment of the assessment. However remote they might have thought to be the chance of a loss in excess of their full statutory liability, they would not have taken even that chance, for the simple reason that nothing was to be gained by it. From all of which it is clear that there was more at stake than the possibility of a loss on the bond transaction limited to the difference between the then market price and the original cost. Whether they were apprehensive that the uncertainty of when so large a quantity of the bonds might be thrown on the market, would result in a still greater depreciation, or whether they believed that the purchase, in the manner proposed, would enhance the market price, or what considerations in whole or in part determined their action, is not apparent; but it is clear that they were impressed with the importance of removing the uncertainties, whatever they were, incident to the Receiver's holdings. It is plain that they deemed it necessary to consider carefully whether it was not for their interest to buy the bonds at the purchase price, taking what they thought to be a small chance of any loss in excess of their statutory liability, in order that they might save, as they believed, a substantial part of the loss growing out of their ownership of the national bank stock.

As we have said the banks knew they were an indispensable part of the plan; without their participation it must fail, with the result that there would be little chance of escaping any part of the assessment.

Before it was called upon to pay in its proportionate share, each bank knew that the proposition to enable the Receiver to dispose of his holdings at the advanced price, was believed by the other two and the stockholders generally, to be for their common interest. In addition to this the Comptroller and Receiver had assured them that after a careful investigation they were satisfied that the accomplishment of the plan would in their opinion result in a saving of $18.00 per share on the assessment (rec. pp. 7 and 8 supra 2 and 3).

It is said in Lewis *v.* Lynn Inst. for Savings, 148 Mass. 235, 244

"To the depositors * * * * the undertaking of the corporation (savings bank) is that it will receive and combine the deposits and manage and use them to the best practical advantage according to the judgment of the trustees and give to the depositors * * * the benefit of the result of such management."

Can there be any doubt that as trustees for the depositors it was not only their right but their duty to exercise their best judgment, to the end that no unnecessary loss should be sustained? Is it not equally clear that inasmuch as everybody concerned, without a dissenting voice, themselves included, had recorded the opinion that the course proposed would accomplish its full purpose, they would have been fully justified in buying their share of the bonds when they honestly believed it would result in a net saving to the Hampden Savings Bank of $1,170; to the Five Cents Savings Bank of $2,160, and to the Institution for Savings of $6,678?

The propriety of their action is not affected by the fact that as it turned out all the stockholders would have been better off if there never had been any bond plan. The test is to be applied to the situation at the time when a course of action must be determined.

Brown *v.* Schlier, 194 U. S. 18, 23

If the savings banks might have bought the bonds the next inquiry is whether they were authorized to participate in the plan in the form adopted by them.

As we have seen, if they had bought the bonds, although they had immediately sold them, there would not have been even in form

a variation from the participation of the other stockholders. The result would have been that they had put into the plan $82 per share of their stock and owned no bonds. The purchasing stockholders would have put in $82 per share, plus the market value of the bonds, which they retained. It is apparent that the pecuniary position of both following the consummation of the plan was identical.

If the savings banks considered the bonds a good purchase we should rather expect to find that they availed themselves of an opportunity to make a profitable investment which under ordinary circumstances was denied them. It may be that if there had been offered, in addition to the savings banks' proportion (which was promptly sold rec. p. 9), any substantial amount of those purchased by the other stockholders, the market would not have held up. In that case the advantage was with the savings banks. In any event it is clear that their participation in the form they adopted did not leave them in any worse position then the other stockholders.

The evidence does not disclose, unless inferentially, why the banks did not buy the bonds. Certainly the fact that they could not buy them for investment did not prevent their buying them to save a loss; nor does it explain why they preferred to come into the plan in the manner described. The natural inference would seem to be that while they had decided to go into the plan on equal terms with the other stockholders, they had also decided not to retain any bonds; that if they bought them they should immediately sell them, and inasmuch as it would be a rather more simple and direct operation, and come to precisely the same thing, they would give their checks for the amount of the advance to the agent of themselves and the other stockholders, leaving it to him to arrange the details by which the form adopted by them should, so far as their quota of the bonds was concerned, accomplish the same purpose as if they had actually bought them.

However, the manner of participation or the motives that led them to select it, are of little consequence since the savings banks did no more nor less than enter into an arrangement with the other stockholders by which they carried out their part of the plan with a slight variation in form, but none in substance.

If it be argued that unless their payments were to be applied in reduction of their stockholders' liability they were made without con-

sideration, it will readily be seen that there is no sound basis for this contention.

It is said that they purchased no bonds, nor did they receive any consideration or anything of value for the $82 per share they paid (rec. p. 9). The same thing is true of the $82 per share paid by the other stockholders in excess of the market value of the bonds they bought. The consideration is equally good whether it consists of something received by the payor or something yielded by the payee. There can be no question that it was in consideration of the payments by the savings banks that the Receiver turned over their proportion of the bonds to be sold by the other stockholders at the market price (rec. p. 9).

The arrangement by which the savings banks carried out their plan in another form was made between themselves and the other stockholders. Without considering what the legal effect would have been if the arrangement under which the banks, instead of buying bonds paid in the amount of the advance over the market price, had been made directly with the Receiver, it is not at all strange that it appears that that part of the arrangement was made by the stockholders among themselves. There was no reason, however, why he should not approve of their own arrangement by which certain of them instead of actually buying bonds were to pay to their common agent the amount of the advance and which he in turn was to pass along to the Receiver in consideration of his turning over at the market price to the purchasing stockholders the bonds which the non-purchasers would have taken had they not chosen to have their participation take the form described. It will not be doubted that the savings banks made their payments to the stockholders' agent with the full knowledge and intention that they were to be used for the purpose of procuring from the Receiver their share of the bonds, which were forthwith to be sold at the market price, thereby consummating the general plan upon the terms and in the manner agreed upon between both classes of stockholders.

There is no basis for a contention that the Receiver did not give good consideration for the sums received by him for the bonds in excess of the market price.

It cannot be assumed that he would have immediately thrown any or all of his bonds on the market; what he might have realized for them if they had not been taken off of his hands by the stockholders will

never be known. It is not at all certain that they would not have brought more than the current market price; nor is it unlikely that there was a cause of action against the directors who had invested in a single industrial security an amount nearly three times the entire capital stock of the national bank. He may have had other plans by which he hoped to save the whole or part of the loss growing out of the national bank's unfortunate speculation. All these possible sources of benefit were lost by the sale of the bonds at the original purchase price.

Without reference to the adequacy of the consideration between the Receiver and the savings banks, there was ample consideration in the payments by the other stockholders of the advance over the market price of the bonds bought by them, in pursuance of the plan by which all were to share on equal terms the burden of taking off of his hands the Receiver's entire holdings.

Martin *v.* Meles 179 Mass. 114

VIII.

THE BOND PLAN WAS FULLY EXECUTED BY ALL PARTIES CONCERNED LONG BEFORE THE CROSS ACTION WAS BROUGHT AND THE SAVINGS BANKS ARE NOT NOW ENTITLED TO ANY RELIEF.

It is well settled that a contract ultra vires of a corporation cannot be made the foundation of an action against it.

If it be assumed that the participation of the savings banks was ultra vires, it may be conceded that if having made their agreement with the other stockholders they had refused to carry it out, its performance could not have been enforced.

Davis *v.* Old Colony R.R. Co., 131 Mass. 258

It is quite another thing, however, to say that after a contract ultra vires of a corporation has been fully performed by all parties it may come into a court of equity and have its acts set aside. Whatever the transaction was, of which the savings banks now say their participation was ultra vires, it had been fully performed by everybody concerned several years before the cross-bill was brought.

In St. Louis, etc., R. R. *v.* Terre Haute, etc., R. R. 145 U. S. 393,

the plaintiff undertook to have set aside a lease of its railroad and franchises to the defendant. It is said in the opinion p. 406:

"It may therefore be assumed * * * that the contract in question was ultra vires of the defendant and therefore did not bind either party and neither party could have maintained a suit upon it at law or in equity against the other. It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can it is somewhat remarkable that in the repeated and full discussions which the doctrine of ultra vires has undergone in the English Courts within the last fifty years no attempt has been made to bring a suit like this.

If the contract is illegal affirmative relief against it will not be granted at law or in equity unless the contract remains executory or unless the parties are considered not in equal fault as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant.

"When the parties are in pari delicto and the contract has been fully executed on the part of the plaintiff by the conveyance of property or by the payment of money and has not been repudiated by the defendant it is now equally well settled that neither a Court of law nor a Court of Equity will assist the plaintiff to recover back the property conveyed or money paid under the contract."

The principle has been recognized repeatedly that the executed contracts of corporations must stand and that where property has passed under an ultra vires contract to one who has never repudiated it, his possession will not be disturbed.

Congress etc. Co. *v.* Knowlton, 103 U. S. 49
Thomas *v.* West Jersey R.R. Co., 101 U. S. 71
Cincinnati etc. R.R. Co. *v.* McKeen 64 Fed. 36
Same *v.* Same, 159 U. S. 249
First Nat. Bank *v.* Stewart, 107 U. S. 676
Brown *v.* Schleier, *supra*
Harriman *v.* Northern Securities Co. 197 U. S. 244

In Attleboro National Bank *v.* Rogers, 125 Mass. 339 it appeared that the defendant delivered certain promissory notes to the plaintiff, a national bank, with the understanding that it might have until the following Monday to decide whether it would buy them. In the interval the bank paid for the notes and the makers thereof suspended payment. The bank did not learn of the suspension until after it had paid for the notes. On the Monday referred to the bank applied to the defendant to take back the notes which the latter declined to do. It then sued to recover the price it paid for the notes, alleging that

under the national banking laws it had no right to buy promissory notes. In the course of the opinion it is said:

"It appears from the facts that the defendants received money of the plaintiff and the real question in the case is, to whose use did they receive it. They say they received it to their own use; that they received it in payment of certain promissory notes sold and delivered by them to the plaintiff. If this be so, it is immaterial whether the plaintiff had the right to buy or not. The defendants had a right to dispose of the notes to whosoever they chose and if the plaintiff bought them and paid for them it could not rescind the contract thus fully performed and executed upon the ground that it was a purchase which it had no authority to make and recover back the money paid upon it. A corporation acting without authority is not in the position with the privileges of an infant to avoid an improvident contract but in the position and subject to the liabilities and disabilities of a wrongdoer if it exceeds its authority. It cannot complete a bargain with a third party which such third party has a right to make and then rescind the contract wholly executed if such contract proves to be an improvident one and recover back the consideration.

"The real controversy between these parties is upon a question of fact. Was there an executed contract between them, of which the transferring of the notes upon the one side and the payment of the money upon the other, were the respective considerations? If so, the transaction was complete, and the plaintiff cannot rescind and recover back the money paid."

If then the payments by the savings banks made in lieu of their purchase of bonds in order that the plan to dispose of the Receiver's entire holdings might succeed, were in excess of their corporate powers the transaction of which the payments were a part, has been fully executed by all concerned and they now have no standing to have their acts set aside.

Inasmuch as the savings banks by their cross-bill are seeking the aid of a Court of Equity it is pertinent to consider briefly the equities as they affect the various parties concerned.

If it be urged that it is inequitable that stockholders should be compelled to respond in excess of their statutory liability for the benefit of creditors of a national bank, and that a court of equity should, if possible, afford them relief from that burden, it is to be borne in mind that creditors are entitled to be paid in full so far as the condition of the insolvent bank makes it possible. If the bonds without the interposition of stockholders, could have been sold for more than their then market price it would have helped creditors to that extent. If the directors were answerable in damages the creditors would have

reaped the benefit. There may have been other factors in the situation not disclosed by the record. Whether the obligations of creditors would be met in full, or if not what the deficiency would have been, will never be known. But if in the hope of reducing their loss they closed to creditors sources of advantage that otherwise would have been available, they did it at their own risk. The creditors did not ask them to buy the bonds, nor was the purchase made for their benefit. On the contrary they did it entirely for their own benefit and they fully understood what they were doing. It is their misfortune that a transaction which they hoped would diminish their loss has only involved them in a greater one. This, however, is not at all the fault of the creditors, nor can they be made to suffer on that account.

This brings us to a consideration of the equities between the savings banks and the other stockholders.

It appears that the savings banks made their payments in the expectation and hope that the national bank would thereby be made solvent and their liability for its indebtedness extinguished (rec. p. 9). Of course this does not mean that their purpose was to make voluntary contributions, principally for the relief of other stockholders owning nearly three-fourths of the capital stock of the national bank; nor does it mean that they entertained any expectation or hope that their payments alone would bring about that result. On the contrary they knew very well that restored solvency could come only through equal contributions by the other stockholders.

If there is any one thing more than another that the agreed statement leaves free from doubt it is that all the participating shareholders, individuals and savings banks alike, agreed with one another to share equally in some form the burden of taking the Receiver's bonds off of his hands at the original purchase price.

As we have seen the sale left all participating shareholders in the same pecuniary position.

It is in such a situation that the savings banks ask a Court of Equity to relieve them of the effect of their agreement principally at the expense of the other stockholders but to some extent of the creditors.

If the position taken by them is sound they are entitled to have their payments returned to them. Without interest these amount to

more than $45,000. The 49% assessment shows that the deficiency was $98,000. The aggregate of the two sums brings the deficiency up to $143,000. To meet this the assessment must be more than 71% instead of 49%. Including the price of the bonds in excess of their market value the loss to individual shareholders will be $153 per share or $82 per share more than that of the savings banks. At the same time the savings banks will have compounded for $71 per share a liability that beyond any question would have been $100.

The principle is too well settled and the authorities too numerous to call for argument or citation that a corporation cannot set up its ultra vires contract for the purpose of retaining without compensation money or property received under it.

It may be true that in the strict sense the savings banks are not now retaining money or other property received by them under their agreement with the other stockholders. It is true, however, that they are retaining a very substantial benefit, to wit, an addition to the funds of the national bank of $82 each on 1444 shares owned by the other stockholders. It amounts to more than $118,000 and it is because of these payments that if their contention prevails they will be able to discharge a liability at $71 per share that otherwise would have cost them $100.

In Nims v. Mt. Hermon Boys' School, 160 Mass., 177, 179, 180 it is said:

"Courts have frequently held that while such contracts (ultra vires) considered merely as contracts are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who after entering into such a contract and inducing a change of condition by the other party, attempts to avoid the contract by a plea of ultra vires. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong."

The point discussed was not necessary to the decision of the case cited, but it is to be observed that the language is not used with reference to a contract fully performed by all parties, but to the question of whether equity would enforce such a contract to prevent injustice. We have not been able to find anything in the Massachusetts cases in conflict with the language quoted.

It is a clear recognition of the principle that strict construction of implied corporate powers must often give way to considerations of equity and good faith.

This Court has frequently recognized the doctrine that where a void contract has been so far executed that property has passed or rights have been acquired under it, the courts will not disturb the possession of such property or compel restitution of money received under such contract.

Thomas *v.* West Jersey R.R. 101 U. S. 71
Union Trust Co. *v.* Ill. Midland R.R. 117 U. S. 434
Penna R.R. Co. *v.* St. Louis, etc. R.R. Co. 118 U. S. 290

If the cross-bill can be considered as in the nature of an action brought by stockholders to set aside an unlawful contract it must be remembered that those who stand, as to the savings banks in the position of stockholders, remained silent for nearly five years. It is incredible that they were ignorant of the action taken by their officers from June, 1902, when the bond plan was accomplished, until April, 1907, when the cross-bill was filed. Whosever duty it was, representing the corporation, to approve or disaffirm the action of the trustees, it is certain that they must have been fully apprised of what had been done long before the filing of the cross-bill. There is no allegation of ignorance, and no basis for an inference that it existed.

Assuming, as we must, that the shareholders generally would never have bought the bonds unless they understood that the savings banks were to participate in the plan on equal terms, it is clear that it was the duty of the savings banks promptly to notify other stockholders that they had discovered that their participation was unlawful and that they proposed to recover back the payments made by them. The stockholders bought the bonds, as the Comptroller and Receiver well knew, with the understanding that the savings banks were to participate on equal terms in the accomplishment of the plan. Under these circumstances if the proceeds of the sale of the bonds were still in the Receiver's hands it would seem altogether likely that the stockholders might have taken some effectual action for their protection if the savings banks had made their claim seasonably. In any event they slumbered upon their rights too long.

St. Louis etc. R.R. *v.* Terre Haute etc. R.R., *supra*
Harwood *v.* Cincinnati, etc. R.R. Co., 84 U. S. 78
Harriman *v.* Northern Securities Co., *supra*
Peabody *v.* Flynt, 6 Allen (Mass.) 52
Pomeroy Eq. Remedies, Vol. 1, Sec. 23

We know that they had considered the measure of their corporate powers in connection with the bond plan inasmuch as it was because they had no right to buy the bonds for investment that they adopted the other form of participation. It will not be doubted that they had considered carefully their rights and liabilities in the premises and had reached the conclusion either that their action was or was not lawful.

If they then decided that they were within their corporate powers and might properly carry out their understanding with the other stockholders, their conclusion nearly five years later that their act was unlawful does not put them in the class of cases in which it has been held that it is the duty of the corporation no matter how long it has been operating under a void contract to disaffirm and refuse to proceed under it further. Penna R.R. Co. *v.* St. Louis R.R. Co., *supra*, Thomas *v.* West Jersey R.R. Co., *supra*.

The most that can be said is that nearly five long years after the transaction was completed they found reason to believe that their part of it exceeded their implied powers. If we assume that the savings banks made an honest mistake which they did not discover until nearly five years later when it became necessary to look about for a basis of defence to the Receiver's bill, it is none the less true that the other stockholders under the same misapprehension as to the corporate powers of the savings banks have suffered a serious loss which it is now beyond their power to repair. As we have seen a part of the result of sustaining the contention now made by the savings banks would be to put upon the other stockholders a loss of $21 per share on the holdings of the savings banks which they themselves would have had to bear, but for the fact that the stockholders in good faith entered into an agreement with the savings banks under which they were to share upon equal terms the expense of a plan developed for their mutual benefit.

To give the savings banks the relief they seek at the expense of

the other stockholders would do violence "to the plainest rules of good faith." Thomas *v.* West Jersey R.R., *supra*.

But if on the other hand the savings banks believing that their participation was unlawful nevertheless decided to carry out their agreement with the other stockholders and to let future events determine whether they would stand by or repudiate it, their conduct was unconscionable and they have no standing in a court of equity.

Union Trust *v.* Midland R.R. Co., *supra*
Hoyt *v.* Latham, 143 U. S. 553
Cincinnati R.R. Co. *v.* McKeen, *supra*
Royal Bank *v.* Grand Junction R.R. Co., 125 Mass. 490

Upon all the evidence the Receiver submits that he is entitled to judgment for forty-nine dollars upon each share held by the savings banks respectively, together with interest at six per cent. per annum from January 26, 1907, to the date of the order.

Richmond *v.* Irons, 121 U. S. 27
Revised Laws of Massachusetts, Chapter 73, Section 3

Respectfully submitted,

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Supreme Court of the United States.

October Term, ~~1916~~ 1917

No. ~~144~~ 26

ELLIS S. PEPPER, RECEIVER OF THE PYNCHON NATIONAL BANK,
APPELLANT,

v.

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Brief of Springfield Institution for Savings, Springfield Five Cents Savings Bank, and Hampden Savings Bank.

Appeals from the United States Circuit Court of Appeals for the First Circuit.

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STATEMENT OF THE CASE.

These are appeals in equity from the final decrees of the United States Circuit Court of Appeals for the

First Circuit, dismissing bill and cross-bill (r. pp. 30, 41).

The original bill was brought in the District Court of the United States for the District of Massachusetts (r. p. 1) by Ellis S. Pepper, receiver of the National Pynchon Bank of Springfield, against the stockholders of that bank to recover an assessment of $49 a share made by the comptroller of the currency on the 28th day of December, 1906 (r. p. 2).

Inasmuch as the liability of the Savings Banks to, and their right of recovery against, the receiver involved questions not arising in the cases of the other stockholders, the original bill as against these banks only and the cross-bill were referred to a master (r. pp. 2, 3).

The cases were heard by the District Court upon a master's report, and final decrees were entered confirming the report and dismissing the original bill as against the defendants therein with costs, and dismissing the cross-bill without costs to either party (r. p. 3).

The master's report recites that he finds the facts to be as stated in the stipulation of the parties annexed to his report. This stipulation contains an agreement to submit as the evidence at the hearing of the causes by the Court a statement of facts therein contained, and provides that the Court shall have "the power to draw such inference of fact therefrom as may be competent under the rules of evidence." The following are the more important of the facts agreed and found by the District Court:

The Pynchon National Bank is a national banking association having an authorized capital of $200,000,

divided into 2000 shares of the par value of $100 each share. On the 24th day of June, 1901, the comptroller determined that the bank was insolvent and appointed Mr. Pepper receiver thereof, and Pepper duly qualified as such (r. p. 7).

The defendants in the original bill, hereinafter referred to as the "Savings Banks," are savings banks incorporated under the laws of the commonwealth of Massachusetts, subject to the provisions of chapter 116 of the Public Statutes, and chapter 113 of the Revised Laws. At the date of the appointment of the receiver the Springfield Institution for Savings was the holder of 371, the Springfield Five Cents Savings Bank was the holder of 120, and the Hampden Savings Bank was the holder of 65, shares of the capital stock of the National Bank (r. p. 7).

On March 18, 1902, the comptroller made an assessment, payable on or before May 15, 1902 (r. p. 7), upon the shareholders of the National Bank of $200,000, that is to say, of $100 upon each and every share, to enforce their individual liability for indebtedness of the association under sections 5151 and 5234 of the Revised Statutes.

On the 10th day of April, 1902, the comptroller, in a letter written by him in good faith and with the expectation that it would be, as it was, shown to the shareholders, including the Savings Banks, stated that, if the stockholders purchased at 95 per cent, a price very much in excess of their market value, bonds belonging to the National Bank of the par value of $577,000, the payment of this assessment of $100 would not be necessary unless some unlooked for shrinkage in the value of the assets should happen,

which the letter stated to be highly improbable. The stockholders, excepting the Savings Banks, made these purchases (r. pp. 7, 8, 9).

Inasmuch as it was *ultra vires* of the Savings Banks to purchase such bonds as an investment, the proportion of the bonds which would have been taken by them if they had purchased under that arrangement was, by agreement between the receiver and other stockholders, sold by the latter at the then market value, and the proceeds of the sales paid to the receiver; and it was arranged that the Savings Banks, instead of purchasing such proportions, should pay to the receiver the difference between their market value and what they had cost the National Bank (r. p. 9).

Accordingly, there was paid to the receiver by the Springfield Institution for Savings, as owner of 371 shares, $30,360.17; by the Springfield Five Cents Savings Bank, as owner of 120 shares, $9820; and by the Hampden Savings Bank, as owner of 65 shares, $5319.16. The Savings Banks did not purchase any of the bonds, nor did they receive any consideration or anything of value for these payments which were made with the expectation or hope that the National Bank would thereby be made solvent and that their liability as stockholders for its indebtedness would thereby be extinguished (r. p. 9).

The payments were made, as the stipulation recites, "without any agreement or obligation on the part of the comptroller or receiver that the payments . . . should in whole or in part discharge the liability of the Savings Banks for or on account of the indebtedness of the National Bank and any stock assessments

excepting so far, if at all, as such agreement or obligation may be lawfully implied from the facts stated in this stipulation, . . . The receiver denies that any such implication is warranted'' (r. p. 9).

The receiver, with the knowledge and approval of the comptroller, retained these contributions and applied them toward the payment of the debts of the bank. The amount which the receiver thus obtained from the assets of the bank, the sales of the bonds, and from these contributions were sufficient to pay 98 per cent of the principal of the bank's indebtedness (r. pp. 9, 10).

The District Court judge made the finding that—

> ''Although there was no express agreement that the sums paid by the savings banks to the receiver should be applied in reduction of the assessment of March 18, 1902, I find that the savings banks in making these payments understood that they were to be applied in reduction of that assessment, and that the comptroller and receiver by their conduct so gave them to understand, and tacitly agreed to such an application. If, however, I am not warranted in drawing this conclusion from the agreed facts, then I find that the sums thus paid to the receiver were paid under a mistake of fact, and in the belief on the part of the savings banks that they were to be so applied'' (r. p. 18).

On July 22, 1902, after these payments were made, the receiver wrote to the shareholders of said National Bank, under the instructions of the comptroller, as follows (r. p. 10):

> "Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary."

On the 28th day of December, 1906, the comptroller, for the purpose of paying the remaining 2 per cent of the bank's indebtedness, and interest and expenses of the receivership, made the alleged second assessment of forty-nine dollars ($49), payable on or before the 26th day of January, 1907, and directed the receiver to take the necessary steps to collect the same. No attempt has been made by the receiver to enforce or collect the original assessments of March 18, 1902 (r. p. 10).

The District Court judge, after a recapitulation of the facts, concludes his opinion in these words (r. p. 18):

> "I find that the Pynchon National Bank was insolvent on June 24, 1901, and has continued insolvent to the present time. The bank being insolvent July 22, 1902, when the comptroller undertook to withdraw the assessment of March 18, I ruled that the comptroller was without authority to make the withdrawal; and as that assessment was for 100 per cent of the par value of the stock, I rule that the second assessment of December 28, 1906, was invalid, *Studebaker* v. *Perry*, 184 U.S. 258.

"In view of these findings and rulings, the original bill is dismissed as to the savings banks, with costs.

"The cross-bill dismissed without costs."

The Circuit Court of Appeals affirmed the decrees of the District Court upon the single ground that the comptroller had not annulled or withdrawn the first assessment and without passing upon his authority to do so or upon any other question whatsoever (r. pp. 26, 28, 29).

The proper disposition of these appeals depends upon the questions involved in the following propositions raised by the assignments of error referred to in connection therewith:

1. The second assessment of $49 a share is invalid because the comptroller had no authority to withdraw or annul the first assessment of $100 a share. (Receiver's 39th and 40th assignments of error, r. p. 40, and Savings Banks' 1st assignment of error, r. p. 42.)

2. If the second assessment is invalid, the receiver is not entitled to recover. (Receiver's 32d assignment of error, r. p. 39.)

3. Even if the comptroller has authority to withdraw or annul the first assessment, he did not do so, and the second assessment is invalid. (Receiver's 33d assignment of error, r. p. 39.)

4. If the payments to the receiver, amounting approximately to $82 a share—to wit, by the Springfield Institution for Savings, $30,360.17; by the Springfield Five Cents Savings Bank, $9820; by the Hampden

Savings Bank, $5319.16—were not made under an agreement or understanding that they were to be applied to the first assessment, then such payments were *ultra vires* of the Savings Banks and they are entitled under the cross-bill to recover either the moneys so paid, or, if the second assessment is valid, the amounts of such payments less the second assessment. (Savings Banks' 2d and 4th assignments of error, r. p. 42, and Receiver's 8th and 9th assignments of error, r. p. 37.)

5. If said payments were not made in accordance with an agreement or understanding with the receiver that the same should be applied to the reduction of the liability of the Savings Banks for the first assessment, then they were made by the Savings Banks, as the receiver knew when accepting the same, under a mistake of fact and with the belief that such application was to be made, and the Savings Banks are entitled to recover such payments or the amount thereof less the second assessment if that assessment be valid. (Savings Banks' 3d and 5th assignments of error, r. p. 42.)

I.

1. The second assessment of $49 a share, which the plaintiff seeks to recover, is invalid because the first assessment of $100 a share was lawfully made, and the so-called withdrawal thereof by the comptroller was illegal and void.

2. If the second assessment is invalid, the receiver is not entitled to recover.

The more important statutory provisions bearing upon the liability of shareholders and a receiver's duty

to enforce it are to be found in sections 5151, 5234, and 5236 of the Revised Statutes, and the Act of June 30, 1876, c. 156, sec. 1, (19 St.L. 63):

5151 The shareholders of any incorporated

Sec. 5234. "On becoming satisfied, as specified banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Sec. 5234. "On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order of a court of record of competent jurisdiction, * * * may sell all the real and personal property of such association on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so paid to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

> Sec. 5236. "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The Act of June 30, 1876, referred to, provides that (italics ours)—

> "whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver *who shall proceed to close up such association, and enforce the personal liability of the shareholders,* as provided in section fifty-two hundred and thirty-four of said statutes."

The explicit provision in section 5151 that the shareholders "shall be held individually responsible . . . for all contracts, debts and engagements of such association to the extent of the amount of their stock therein," the authority conferred by section 5234 upon the receiver under the direction of the comptroller to

enforce such liability by assessment, and the peremptory requirement in the Act of 1876 that the receiver "shall enforce the personal liability, as provided in Section fifty-two hundred and thirty-four," of an insolvent association leave no escape from the conclusion that it is the comptroller's duty to enforce the personal liability of the stockholders by assessment and, if necessary, by suit to collect it.

In *Studebaker* v. *Perry*, 184 U.S. 258, the comptroller made an assessment of 16 per cent par value on the shareholders, which was paid by the appellant Studebaker. Later, the comptroller made a finding that the first assessment was insufficient, levied an additional assessment of 7 per cent, and brought suit against the appellant to collect it. On demurrer to the declaration, judgment was rendered for the amount of the second assessment.

In the opinion of the Supreme Court, delivered by Mr. Justice SHIRAS, affirming the judgment, the question is thus stated, at page 259:

> "The single question for our determination is whether the Comptroller of the Currency, acting under the national banking laws, can validly make more than one assessment upon the shareholders of an insolvent national banking association"—

and, after reference to sections 5234 and 5236, it is said, at page 261 (italics ours):

> "The general purpose of the statute undoubtedly was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the

> amount of their stock therein, and it would be a *singular construction of law that would empower the Comptroller, by making an inadequate assessment, to relieve the shareholders, upon paying such assessment, from their entire liability.*"

If the comptroller cannot relieve shareholders of their full liability by making an inadequate assessment, he certainly cannot recall a necessary assessment and substitute for it an inadequate dicker.

The duty of the comptroller to fully enforce the liability by assessment is the basis of the Court's opinion that his authority is not exhausted by a single assessment for less than the statutory amount, as stated at page 262 (italics ours):

> "If it be the *duty* of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he *must*, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances, the value of the Bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the con-

> dition of the bank's affairs, in the time that might thus elapse some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thrown upon the creditors.
>
> "There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences."

The duty of the comptroller to make and enforce an adequate assessment necessarily excludes the notion that he may withdraw it.

Any suggestion that the assessment of $100 a share was properly recalled because more than the amount required to pay up the creditors in full, if well founded in fact, is met by the provision in section 5236 of the Revised Statutes for repayment of the surplus to the shareholders, and the statement by the Court in *Studebaker* v. *Perry, supra,* at page 264, that—

> "If too much be collected it is provided by the statute that any surplus which may remain after satisfying the demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

But, in fact, the assessment of $100 a share was inadequate even to pay the creditors in full.

This appears from the statement in the stipulation that the payment by the Savings Banks of *approximately* $82 a share (r. p. 9), and the purchase by other

stockholders, from the receiver, of bonds for which they paid in excess of their then market value an amount equaling approximately $82 on each share owned by such stockholders (the purchase was on the basis of three bonds for every ten shares at a price of $950 a bond, the market value being about $650 (r. pp. 8, 9), were insufficient to restore the bank to a solvent condition, and that a further assessment of $49 a share, amounting to $98,000, was necessary to pay in full the creditors and the expenses of the receivership (r. p. 10).

Therefore, we need not consider the question whether the actual restoration of a national bank to a solvent condition, rendering the payment of an outstanding assessment unnecessary, might within the spirit of the statutes authorize the comptroller to withdraw, recall, or suspend enforcement of it.

It is clear that neither the spirit nor the letter of the statutes authorized the comptroller to recall the first assessment of $100 a share, and that the second assessment of $49 a share is unauthorized and void.

Moreover, the payments to the receiver of $30,360.17 by the Springfield Institution for Savings, $9820 by the Springfield Five Cents Savings Bank, and $5319.16 by the Hampden Savings Bank were made under an implied agreement with the receiver that the amount thereof should be applied to the reduction of their liability for the first assessment, as found by the District Court judge, and no argument is needed to support the position that he could not thereafter lawfully recall or annul that assessment and levy a second one for an amount requiring a total payment by them of a sum in excess of the par value of their shares.

The following is the finding of the District Court judge:

> "There was no express agreement that the sums thus paid to the receiver should be applied by him in part payment of the assessment then outstanding against these banks as stockholders. Nothing was turned over by the receiver to the banks in exchange for these payments, and whether there was an implied or tacit understanding as to this matter is left open to be inferred or not from the agreed facts. The comptroller and the receiver believed that these sums together with sums realized from the sale of certain mortgage bonds of the bank, which the receiver sold to stockholders other than the savings banks at an advance of $300 a bond in excess of their then market value, plus what could be realized out of other assets of the bank, would be sufficient to pay its debts in full; that no further payments would be required; and they so gave the savings banks to understand. Although there was no express agreement that the sums paid by the savings banks to the receiver should be applied in reduction of the assessment of March 18, 1902, I find that the savings banks in making these payments understood that they were to be applied in reduction of that assessment, and that the comptroller and receiver by their conduct so gave them to understand, and tacitly agreed to such an application" (r. pp. 17, 18).

This finding is based on evidence that these payments of approximately $82 a share were made by the Savings Banks as owners of the stock to the receiver

at a time when it is conceded that the first assessment was in force (r. p. 9).

Inasmuch as equity considers that as done which ought to be done, and imputes an intention to fulfil an obligation, and inasmuch as the assessment of $100 was outstanding at the time of the payments made by the Savings Banks and no attempt to suspend or recall it had then been made, and inasmuch as it was then the duty of the receiver to collect and of the Savings Banks to pay that assessment, the finding of the District Court should be sustained unless admitted facts as a matter of law require a different conclusion.

The following analysis of the evidence will show an absence of any such facts:

The letter of the comptroller to the directors of the National Bank under date of April 10, 1902 (r. p. 7), antedated the payments, and is nothing more than an expression of the comptroller's belief that the purchase of the bonds of the American Writing Paper Company of the receiver by the stockholders would enable the receiver "to pay out to the creditors one hundred (100) cents on the dollar and that within a very few months," and "that there will be no escape from an assessment of 100 per cent. against the stockholders if the receiver had to put the writing paper bonds on the market at 65 or thereabouts."

It is entirely consistent with this letter that the payments made by the Savings Banks at a later date were on account of their liability for the first assessment.

It further appears from the stipulation that "the purchase of the bonds at the price of $950 a bond was consummated under an arrangement entered into by

the receiver with the knowledge and approval of the comptroller, whereby the stockholders of the National Bank *generally* [r. pp. 8, 9] were each to take at the price of $950, three bonds for every ten shares of the stock of said bank owned by them respectively," and that "it was arranged with the knowledge and approval of the comptroller and the receiver that the Savings Banks instead of purchasing their proportion of the bonds should pay the difference between their value and what the National Bank paid for them" (r. p. 9).

Certainly this arrangement is not inconsistent with the finding of the District Court judge that there was an understanding that the payments were made on account of the assessment, particularly as it is further expressly recited in the stipulation that the Savings Banks did not "receive any consideration or anything of value for their contributions," which they made *as owners of the stock* (r. p. 9), "with the expectation and hope that the bank would thereby be made solvent and that their liability as stockholders for its indebtedness would thereby be extinguished" (r. p. 9).

This liability was in form of the assessment, and the hope and expectation that the balance of the assessment would not be required is not, either as a matter of law or as a matter of fact, at all inconsistent with an understanding that the payment *pro tanto* reduced the liability.

It also appears from the stipulation that Ellis represented the Savings Banks in passing their checks over to the receiver, as well as other stockholders on paying the purchase price of the bonds they bought (r. p. 9).

The stipulation further recites that the receiver and the comptroller, at the time the former took the checks, "knew the capacity in which Ellis acted and that the checks were given for the purpose and under the circumstances aforesaid" (r. p. 9).

It cannot be urged that this knowledge of the receiver and the comptroller that the Savings Banks made the payment with the expectation that it would be sufficient to extinguish their liability for the assessment and the absence of dissent is as a matter of law inconsistent with the finding of the District Court that the receiver and comptroller tacitly agreed to apply the payment in reduction of the assessment; on the contrary, it supports that finding.

In the stipulation, after a recital of the above facts, the payments are referred to as "contributions" to avoid any implication that the receiver by entering into the stipulation precluded himself from arguing that they were not made in reduction of the assessment, but merely as gifts.

These payments were made in June, 1902, and the stipulation, after referring to them, refers to a letter written by the receiver on July 22 of this year, wherein he says that "large amounts of securities sold make it probable that the payment of the assessment will not be required" (r. p. 10), referring to the $100 assessment.

There certainly is nothing in this statement which, as matter of law, requires a finding that the assessment had been withdrawn or that the Savings Banks should not be credited with the payments theretofore made, if, contrary to expectation, full payment of the assessment was required.

The letter then continues with a statement that "the comptroller has accordingly decided to withdraw this assessment and I have been instructed to *suspend* any action to enforce its payment." The fair interpretation of this sentence is a decision to *temporarily* withdraw the assessment and to suspend any action to collect it until, and unless, its enforcement should become necessary. The letter concludes with the statement of the comptroller of a reservation of a right to collect "any assessment or assessments that may hereafter be necessary," which, taken in connection with the sentence preceding it, includes a reservation of the right to collect the first assessment already made, if necessary.

On April 26, 1902, the directors of the Hampden Savings Bank passed the following vote (r. p. 12):

> "A proposition from Pynchon Bank Directors for us to pay the difference between 70 & 95, 25% on $19,000 American Writing Paper Bonds in lieu of an assessment of 100% [$4750 instead of $6500] was referred to F. H. Stebbins with power."

There is no evidence that this proposition was accepted by Stebbins and, in fact, the amount paid was $5319.16 (r. p. 9), and not $4750.

In any event, the proposition was, in effect, the payment in part of a liability to escape, if possible, the payment of the whole.

On May 7, 1902, the trustees of the Springfield Institution for Savings voted (r. p. 12)—

> "that the Board of Investment be authorized to enter into an agreement with the receiver and

> directors of the Pynchon National Bank with a view to the adjustment of the relations of this Institution to that bank and to the discharge of its liability as a stockholder of the bank in such form as to them shall seem best."

Its liability as a stockholder was for the assessments, and this vote indicates the real arrangement to which the receiver and the banks were parties, namely, payments in discharge of liability for the assessment.

The significance of this vote is not controlled by the entry in the cash-book of the payment to profit and loss, "that we may, as is believed probable, thereby avoid assessment of 100%" (r. p. 13), meaning simply a voluntary payment of part, in order to avoid the compulsory payment of the whole.

There is nothing in the circumstances which we have set forth which, as a matter of law, controls the finding of the District Court, and excludes the ordinary presumption or inference that the payment of money by a debtor to a creditor is on account of the indebtedness.

The receiver insists that other stockholders who bought these bonds at a price then in excess of their market value have equities which are inconsistent with a finding that the payments in question were made on account of the assessment of $100 a share then outstanding.

But the present controversy is one between these Savings Banks and the receiver, and the liability of one stockholder is neither increased nor diminished by the arrangements between the receiver and other stockholders, or the failure, ability, or inability of other

stockholders to pay the assessments on their shares for which they are responsible.

United States v. *Knox*, 102 U.S. 422.

Moreover, if anything is to be assumed, it is that the bonds in question have subsequently appreciated in value and show those stockholders a profit on their purchases.

It follows, therefore, that the comptroller had no authority to annul or recall the first assessment of $100, and that the second assessment of $49 was in contravention of section 5151, limiting the liability of the stockholders to the amount of the par value of their stock.

While the determination by the comptroller of the necessity and amounts of an assessment authorized by the statutes is conclusive on the stockholders—

Kennedy v. *Gibson*, 8 Wall. 498;
Studebaker v. *Perry*, *ubi supra*—

yet an assessment levied for an amount and purposes unauthorized by the statute is illegal and will not be enforced by the Court.

The power of a Court in equity to restrain the collection of an illegal assessment is dealt with by this Court in *United States* v. *Knox*, 102 U.S. 422, wherein it was decided that the liability of each stockholder was to contribute such sum, not exceeding the par value of his stock, as will bear the same proportion to the deficiency of assets as his stock bears to the whole amount of the capital stock of the bank, and that a second assessment to supply a deficit caused by the receiver's inability to collect the first one from in-

solvent stockholders was beyond the power of the comptroller. In the opinion of the Court it was said by Mr. Justice SWAYNE, at page 425, that—

> "Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

The assessment itself is the cause of action, without which a suit to enforce the liability of a shareholder cannot be maintained.

McClaine v. *Rankin*, 197 U.S. 154.

The present suit is to recover an invalid assessment of $49 a share. The receiver cannot recover by proof of the existence of a prior assessment of $100, for which suit has not been brought, and which, in fact, is barred by the Statute of Limitations.

II.

3. Even if the comptroller had authority to withdraw or annul the first assessment under any circumstances, he did not do so, and the second assessment is invalid.

The record discloses a valid assessment, made on the 18th day of March, 1902, of $100 (r. p. 7). It dis-

closes an attempt to collect an alleged assessment of $49 levied in due form on the 28th day of December, 1906 (r. p. 10).

Unless the record discloses that the first assessment was annulled, the second assessment did not recall or annul the first one, but is merely an unauthorized and invalid act of the comptroller.

As said by PUTNAM, J., in the opinion of the Circuit Court of Appeals in this case, the levy of the first assessment is the quasi-judicial action of the comptroller, which must be exercised in accordance with the authority conferred upon the comptroller by the statutes and the rules prescribed by the statute, as interpreted by this Court (r. p. 28).

It is useful in this connection to again refer to the language of the Court in *United States* v. *Knox,* 102 U.S. 422, at page 425:

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the shareholders; 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

It is the duty of the comptroller to collect an assessment levied, even though the amount collected may be more than sufficient to pay the indebtedness of the bank, and to return the surplus, if any there be, to the stockholders.

It follows, therefore, that it is essential to a withdrawal or annulment of an assessment levied that there should be a determination by the receiver that its payment is no longer required for the payment of the indebtedness, and a declaration by him in some form of a revocation or annulment of the assessment. The mere levying of a second assessment is not the expression of such a determination or revocation.

If the aggregate amount of the two assessments is less than 100 per cent of the par value of the stock, the levying of the second assessment is merely what it purports to be—an additional assessment authorized and required by the statutes. If the aggregate amount is more than 100 per cent, the second assessment is merely what it purports to be—an additional one, unauthorized by the terms of the statute, and void.

It is obvious that the levying of an assessment must be a matter of record in the comptroller's office, and is not to be proved by conversation or letters between a receiver and the stockholders.

Otherwise, in actions at law brought by a receiver in different jurisdictions against single stockholders, there would be submitted to the jury as a question of fact whether an assessment had been made, with nothing to prevent different conclusions and inconsistent verdicts in the different cases. Like considerations require that the comptroller's record should disclose the withdrawal of an assessment.

It was well said by PUTNAM, J., in delivering the opinion of the Circuit Court of Appeals in this case, that—

> "We find nothing further in the record, or in the opinion of the District Court, which shows any definite action in reference to the first assessment. Neither the record nor the opinion of the District Court assumes to discuss the question whether or not the assessment of one hundred dollars per share, laid by the Comptroller, could be annulled, or in any way disposed of, in this informal manner. The history of the statutes of the United States on this topic, and their nature, are well shown by *Kennedy* v. *Gibson,* 8 Wall. 498, 505, *Bushnell* v. *Leland,* 164 U.S. 684, and *Studebaker* v. *Perry, ubi supra,* at various points through the opinion. These citations show that the duty of the Comptroller in this connection was a quasi-judicial one, with the result that any findings, though ex parte, were absolutely binding on the shareholders, and were of a character which involved an accounting and a solemn record on the part of the Comptroller's Department. It is not credible that the solemn findings of the Comptroller of such a character should be nullified and wiped out by a mere letter such as we have quoted, followed by the mere inaction of the kind we have described" (r. p. 28).

In the case at bar there is no record in the comptroller's department of any official action on his part recalling or annulling the first assessment; nor is there evidence of any definite action of the comptroller recalling or annulling that assessment. The United

States relies on the letters of April 10 and July 22, 1902, the first ante-dating, and the latter post-dating the payments made by the Savings Banks.

In the letter of April 10, written by the comptroller, he says:

> "I am just in receipt of the report of the special examination of this trust made by an official of this Department sent to Springfield for that purpose, and I am quite satisfied if this sale of bonds is effected the Receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.
>
> "I wish further to say that after this examination it is very plain that there will be no escape from an assessment of 100 per cent against the stockholders, if the Receiver had to put the Writing Paper bonds on the market at 65 or thereabouts.
>
> "The Receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95) the trust will pay out in full and I do not hesitate to say there will be no assessment necessary against the stockholders unless some unlooked for shrinkage in value of assets should happen,—which of course is highly improbable" (r. p. 8).

It is too evident for discussion that nothing contained in this letter amounts to a recall of the assessment, but that, on the contrary, the letter itself is the declaration of the receiver that the bank is then insolvent and that the assessment must be paid unless the stockholders do something which they are not bound to do.

The letter of July 22, written by the receiver, states that—

> "Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary" (r. p. 10).

The purpose of this passage is a temporary withdrawal and suspension of any action to enforce the payment of the assessment. There is no determination that the bank has been restored to a solvent condition, but, on the contrary, merely a statement that it seems "probable" that the payment of the assessment will not be required.

The statement that the comptroller has decided to withdraw this assessment is accompanied by an equally explicit statement that the receiver has been instructed to "*suspend*" any action to enforce its payment, showing that the withdrawal referred to was merely a temporary one.

The statement that such withdrawal is made without prejudice to the comptroller's right to levy and collect any assessment or assessments thereafter necessary emphasizes the fact that the comptroller was not satisfied that the bank was solvent, and was not ready to annul the assessment in question.

Moreover, the letter in question is not the letter of the comptroller, and is not in any sense a part of the

records of the comptroller's office. It is merely the receiver's statement of the comptroller's intentions or instructions.

There is no decision of this Court opposed to that of the Circuit Court of Appeals.

In *Bowden* v. *Johnson,* 107 U.S. 251, relied on by the receiver, objection was made to the sufficiency of the proof that the comptroller of the currency decided before the suit was brought that it was necessary to enforce the personal liability of the stockholders.

That proof was a letter of the comptroller, addressed to the receiver, directing the suit against the stockholders. No objection was made in the Circuit Court to the competency or sufficiency of the evidence. The case goes no further than to decide that formal proof of the record was waived.

III.

4. If the payments to the receiver, amounting approximately to $82 a share—to wit, by the Springfield Institution for Savings, $30,360.17; by the Springfield Five Cents Savings Bank, $9820; by the Hampden Savings Bank, $5319.16—were not made under an agreement or understanding that they were to be applied to the first assessment, then such payments were ultra vires of the Savings Banks and they are entitled under the cross-bill to recover either the moneys so paid, or, if the second assessment is valid, the amounts of such payments less the second assessment.

It appears from the stipulation (r. p. 9), and the District Court finds (r. p. 17), that on June 14, 1902,

while the assessment of $100 was outstanding, and before the attempt to recall it, there was paid to the receiver by the Springfield Institution for Savings, as owner of 371 shares, $30,360.17; by the Springfield Five Cents Savings Bank, as owner of 120 shares, $9820; and by the Hampden Savings Bank, as owner of 65 shares, $5319.16—said sums being approximately $82 a share.

There was no express agreement that the sums thus paid to the receiver should be applied by him in part payment of the assessment then outstanding against these banks as stockholders, and nothing was turned over by the receiver to the banks in exchange for these payments (r. p. 17).

In fact, it is agreed that the Savings Banks received no consideration or value, by agreement or otherwise (r. p. 9), unless the payments reduced their liability for the assessment (r. p. 9).

The comptroller and the receiver believed that these sums, together with sums realized from the sale of certain mortgage bonds of the bank, which the receiver sold to stockholders other than the Savings Banks at an advance of $300 a bond in excess of their then market value, plus what could be realized out of other assets of the bank, would be sufficient to pay its debts in full; that no further payments would be required; and they so gave the Savings Banks to understand (r. p. 18).

Assuming, then, that there was no agreement that these payments should be applied in reduction of the liability of the Savings Banks for the assessment, and that, as found by the Court and as stated in the stipulation, nothing was turned over by the receiver to the

banks in exchange for these payments, "nor did they receive any consideration or anything of value" for them, it follows that they were merely gifts or gratuities of money *ultra vires* of the Savings Banks.

A corporation has only the powers given to it by statute.

In *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, at page 65, the rule is thus stated by Mr. Justice GRAY:

> "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds; the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

The rule is thus stated in *Salem Mill Dam Corporation* v. *Ropes*, 6 Pick. 23, at page 32:

> "The power of corporations is derived only from the act, grant, charter or patent by which they are created. In this commonwealth the source and origin of such power is the legislature,

and corporations are to exercise no authority except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporation."

See also—

Thomas v. *West Jersey R.R. Co.,* 101 U.S. 71.

McCormick v. *Market Nat. Bank,* 165 U.S. 538.

California Nat. Bank v. *Kennedy,* 167 U.S. 362.

First Nat. Bank v. *Converse,* 200 U.S. 425.

De La Vergne Refrigerating Co. v. *German Savings Institution,* 175 U.S. 40.

It follows that a corporation is prohibited from doing anything which the statute does not expressly or by necessary implication authorize it to do.

In *Attorney General* v. *Great Eastern Ry.,* 5 A.C. 473, the Court, in deciding that a contract between certain corporations was expressly authorized by an Act of Parliament, and not *ultra vires,* at page 481, thus stated the rule:

"I take it that as far as the main point to be considered is concerned, this house has no more right than any other tribunal to depart from the principle of the decisions which have been already arrived at; more particularly I allude to the last case of the *Ashbury Railway Carriage and Iron*

Company v. *Riche* (L.R. 7, H.L. 653). That case appears to me to decide at all events this, that where there is an act of parliament creating a corporation for a particular purpose and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited."

This rule is not affected by the cases holding that corporations may be criminally responsible for doing an act which the legislature has made penal, although the corporation is not authorized by statute to commit it—

Com. v. *Nashua & L. R. Corp.*, 2 Gray, 54;
Com. v. *Proprietors of New Bedford Bridge*, 2 Gray, 339;
Com. v. *Vt. & M. R. Corp.*, 4 Gray, 22;
Com. v. *Old Colony & F. R.R. Co.*, 14 Gray, 93;
Telegram Newspaper Co. v. *Com.*, 172 Mass. 294;
The Queen v. *Great North of England Ry.*, 9 Q.B. 315, 326—

nor by those cases in which it has been held that they may be liable for torts committed by persons employed by them in a business which, in fact, was unauthorized by the terms of the charter, although in such case contracts by them to engage in such business would be illegal.

Nims v. *Mt. Hermon Boys' School*, 160 Mass. 177.
Taylor v. *Boston Water Power Co.*, 12 Gray, 415.

Fogg v. *B. & Lowell R.R.*, 148 Mass. 513.
Reed v. *Home Savings Bank*, 130 Mass. 443.
Pharmaceutical Soc. v. *London & Provincial Supply Assoc.*, 5 A.C. 857, 869.

There is no escape from the conclusion that, unless the statutes of this commonwealth expressly or by necessary implication gave the Savings Banks power to make these payments by way of gift, as distinguished from payments made in pro tanto reduction of their liability for the debts of the National Bank, the payments were ultra vires.

Revised Laws of Massachusetts, c. 113, sec. 26, subdivision 5, authorizes a savings bank to invest—

> "In the stock of a bank incorporated in this commonwealth, or in the stock of a banking association located in the New England States and incorporated under the authority of the United States," etc.

The power thus given to savings banks by the state statute to invest in shares of a national banking association by necessary implication confers upon a savings bank making such investment the power to discharge the obligations imposed by the Federal statutes on such shareholders.

This obligation of a stockholder is that of paying such a proportion of the deficit of the National Bank after applying its assets to the payment of its debts as the total par value of his shares bears to the whole amount of the capital stock of the National Bank; it is not affected by the solvency or insolvency of other

shareholders, and cannot exceed in the aggregate the par value of the shares of such stockholder.

United States v. *Knox*, 102 U.S. 422.

The liability of the stockholder is for an assessment fixed by the comptroller in accordance with these rules, and does not accrue until the assessment has been called.

Glenn v. *Marbury*, 145 U.S. 499.

Every dollar paid by such shareholder on account of such an assessment diminishes *pro tanto* his liability for the debts of the National Bank, and, as we have seen, the Savings Banks were authorized by necessary implication to make payments on account of such assessments.

But the payments made by the Savings Banks, amounting to approximately $82 a share, were made at a date between the levying of the assessment of $100 a share and the attempt to temporarily withdraw it, and if, as we now assume, they were not made in part payment of the assessment, they did not reduce *pro tanto* the liability of the banks for either that or any other assessment, but left that liability an indefinite one not exceeding $100 a share, depending upon future results of either the winding up or continuance of the business of the National Bank, as might be thereafter determined, and, in fact, resulting in a later assessment of $49 a share.

If the payments had been made on account of the assessment as authorized by the statute, the liability of the banks would have been correspondingly decreased, and in no event thereafter could have exceeded $18 a share.

Upon the assumption above made, that these payments were not made in reduction of the assessment of $100 a share, and inasmuch as nothing of value was turned over by the receiver to the Savings Banks in exchange for or in consideration of their payments (r. p. 9), it follows that they were merely gifts unauthorized by the statute, and therefore prohibited, or, in other words, *ultra vires.*

First Nat. Bank v. *Converse,* 200 U.S. 425, is an exceedingly strong case in support of our contention.

In that case a national bank and other creditors of an insolvent Minnesota manufacturing company organized a new corporation under the laws of that state for the purchase of the capital stock, assets, and liabilities of the debtor corporation, and for the manufacture of the same article theretofore manufactured by the latter. The bank and other creditors exchanged their claims against the old corporation for stock in the new one.

Under the laws of Minnesota, stockholders of the new corporation were personally liable for its debts to the amount of the stock held or owned by them. *Held,* that it was *ultra vires* of the national bank to take the stock in the new corporation, imposing a personal liability, and that the power to take it in order to protect itself from loss on pre-existing indebtedness could not be inferred from a right to accept such stock as security for a present loan, and that therefore the bank was not liable for the assessment made on its shares.

Any unfulfilled expectation that the donations in question would, in connection with the purchase of

bonds by other stockholders, indirectly benefit the Savings Banks by restoring the National Bank to a solvent condition and thus result in a withdrawal of the assessment does not withdraw the case from the rule of *ultra vires.*

Davis v. *Old Colony R.R.*, 131 Mass. 258.
Brewing Co. v. *Klassen*, 185 Ill. 37.

The powers of savings banks are carefully measured and clearly defined by the statutes of Massachusetts, and very slight deviations from the statutory requirements are *ultra vires.*

Greenfield Savings Bank v. *Abercrombie*, 211 Mass. 252.

As said in substance at pages 255 and 256 of the opinion in that case, savings banks hold their funds exclusively for the benefit and security of the depositors, to whom their relation is that of *trustees.*

In fact, upon the assumption that the payments were not on account of the assessment, the case at bar discloses an unauthorized and illegal payment of the trust funds to one who returned no consideration therefor and accepted the payments with full knowledge of their wrongful character.

Not only is the receiver affected with constructive notice of the laws of Massachusetts, which is equivalent, for the purposes of this case, to actual knowledge, *McCormick* v. *Market Bank*, 165 U.S. 538, but he also received the identical checks with actual knowledge of the *ultra vires* character of the transaction (r. p. 9).

These ultra vires *payments should be applied in*

reduction of liability or returned in accordance with equitable rules.

One of the principal grounds upon which the doctrine of *ultra vires* is based is the protection of stockholders against unauthorized uses of the corporate property.

In *McCormick* v. *Market Bank,* 165 U.S. 538, an action to recover a stipulated rental on a lease against a national bank which, before receiving its certificate to do business, took a lease of the plaintiff's building, wherein the Court decided that the lease was *ultra vires,* that the defendant was liable only for the value of its actual occupation and enjoyment, and that the covenants of the lease would not support an action, Mr. Justice GRAY, in delivering the opinion of the Court, said, at pages 549 and 550:

> "The lease sued on, therefore, was clearly prohibited by the very terms of the statute from which the association assumed to derive its power to execute the lease.
>
> "The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. . . ."

In *Ward* v. *Joslin*, 186 U.S. 142, wherein the Court held that the defense of the *ultra vires* character of a contract upon which a judgment had been entered against a corporation could be insisted on by a stockholder as a defense to a suit to enforce his liability for the debts of the corporation, it was said by Chief Justice FULLER, at page 151, that—

> "One of the grounds on which the doctrine of ultra vires rests is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was in their contract in legal contemplation."

It is obvious that the stockholders (or, in this case, depositors who are *cestui que trusts*) can only be protected by compelling restitution of money or other property transferred by a corporation under an *ultra vires* contract or transaction. In *Rankin* v. *Emigh*, 218 U.S. 27, wherein it was decided that a national bank was liable to third persons for moneys paid to it on their account while it was conducting a business of an *ultra vires* character, the right to compel restitution through the agency of the Court is thus stated by Mr. Justice WHITE, at page 36:

> "Although restitution of property obtained under a contract which was illegal, because ultra vires, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property, of others, without

> authority, the law, independently of express contract, will compel restitution or compensation."

So, too, in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U.S. 138, it is said by Mr. Justice PECKHAM, at page 151:

> "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. . . . The right of recovery must rest upon a disaffirmance of the contract and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement and which in justice he ought to recover."

So, too, in *Citizens' Nat. Bank* v. *Appleton*, 216 U.S. 196, wherein it was decided that a national bank which guarantees a loan made by another bank to a third party in pursuance of an arrangement that it be paid the amount due it by the borrower out of the proceeds of the loan is liable for the amount actually received pursuant to the arrangement, notwithstanding its *ultra vires* character. Mr. Justice HARLAN thus states the principle, at page 203:

> "No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice', this Court said in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, 'rests upon all persons, natural and artificial, and if the county obtains the money or property of others without authority, the law, independently

of any statute, will compel restitution or compensation.' "

In the following cases, parties to whom corporate property has been transferred under an *ultra vires* agreement or conveyance have been compelled to return it, or account to the corporation for it.

Pullman's Palace Car Co. v. *Central Transportation Co.*, 171 U.S. 138.

Mallory v. *Oil Works*, 86 Tenn. 598.

Blackburn Building Soc. v. *Cunliffe, Brooks & Co.*, 22 Ch. Div. 61.

Cunliffe, Brooks & Co. v. *Blackburn &c. Bldg. Soc.*, 9 A.C. 857.

Blackburn &c. Bldg. Soc. v. *Cunliffe, Brooks & Co.*, 29 Ch. Div. 902.

See also—

In re Wrexham, Mold & Connah's Quay Ry. Co., L.R. [1899] 1 Ch. Div. 440.

In Brice on Ultra Vires (3d ed.), at page 654, it is said:

"But there is another principle, in accordance with which the liability of an ordinary individual who receives the consideration of an Ultra Vires engagement, may be fixed at the full nominal amount of such consideration. It is this—it has been seen that for certain purposes, the assets of corporations are looked upon as a trust fund, or quasi trust fund—supposing this to be correct, supposing that by reason of the limited capacity of corporations, their assets are impressed or affected with qualities or restrictions of such a

kind that these assets cannot lawfully be parted with, except for the proper legal purposes of the corporation, and in pursuance of engagements which are Intra, and not Ultra, Vires; then it would seem necessarily to follow, that any and every person receiving any of the assets of a corporation, must restore them, unless he received them under circumstances or for a consideration not Ultra Vires of the corporation."

The following are cases wherein a corporation has repudiated an *ultra vires* agreement or conveyance, and has been compelled to return, or account to the other party for, the property which it has received thereunder.

Thomas v. *West Jersey R.R. Co.*, 101 U.S. 71.

Chapman v. *County of Douglas*, 107 U.S. 348 (1882).

Penn. R. Co. v. *St. Louis, Alton &c. R.R. Co.*, 118 U.S. 290.

Oregon &c. R. Co. v. *Oregonian R. Co.*, 130 U.S. 1.

Logan County Nat. Bank v. *Townsend*, 139 U.S. 67.

Pullman's Palace Car Co. v. *Central Transportation Co.*, 171 U.S. 138.

Citizens' Nat. Bank v. *Appleton*, 216 U.S. 196.

Rankin v. *Emigh*, 218 U.S. 27.

If, as held in the two cases last cited, a party can recover from a national bank property which the latter has received *ultra vires*, it will be difficult to point

out any reason why a receiver of a national bank who has received, with guilty knowledge, funds of a savings bank in a transaction *ultra vires* of the latter should not be compelled to make restitution.

Those cases wherein a natural person has sought to repudiate a conveyance to a corporation on the ground that it was *ultra vires* of the corporation to acquire the property, as in—

National Bank v. *Matthews,* 98 U.S. 621;
Kerfoot v. *Farmers' & Merchants' Bank,* 218 U.S. 281—

are not applicable to the case at bar.

Neither is the case at bar affected by those cases wherein the law merchant prevails over the *ultra vires* rule, and a corporation having authority to give negotiable bonds or notes within the scope of its business is held liable on them when given by an officer clothed with apparent power, but in fact for an unauthorized purpose.

Monument Nat. Bank v. *Globe Works,* 101 Mass. 57.
Merchants' Nat. Bank v. *Citizens' Gas Light Co.,* 159 Mass. 505.
Louisville, New Albany & C. R. Co. v. *Louisville T. Co.,* 174 U.S. 552.

But such obligations are not enforceable where they are not within the protection of the law merchant, as where the holder takes with notice—

Com. v. *Smith,* 10 Allen, 448;
Usher v. *Raymond Skate Co.,* 163 Mass. 1;

J. G. Brill Co. v. *Norton & Taunton St. Ry.*, 189 Mass. 431—

or where the holder was chargeable with knowledge that there was no authority, real or apparent, to bind the corporation by giving the obligation.

Craft v. *South Boston R.R.*, 150 Mass. 207.
Lowell Savings Bank v. *Winchester*, 8 Allen, 109.
City of Parkersburg v. *Brown*, 106 U.S. 487.

IV.

5. If said payments were not made in accordance with an agreement or understanding with the receiver that the same should be applied to the reduction of the liability of the Savings Banks for the first assessment, then they were made by the Savings Banks, as the receiver knew when accepting the same, under a mistake of fact and with the belief that such application was to be made, and the Savings Banks are entitled to recover such payments or the amount thereof less the second assessment, if that assessment be valid.

The District Court, after finding that there was an agreement between the Savings Banks and the receiver to apply the payments in reduction of the assessment of $100, further found:

> "If, however, I am not warranted in drawing this conclusion from the agreed facts, then I find that the sums thus paid to the receiver were paid under a mistake of fact, and in the belief on the part of the savings banks that they were to be so applied" (r. p. 18).

This finding is supported by the statements in the stipulation that the payments were made by the Savings Banks with the expectation that their liability as stockholders for the indebtedness of the National Bank, that is to say, for the assessment, would be thereby extinguished (r. p. 9), and that they did not receive any consideration for the same (r. p. 9).

The Savings Banks, having made these payments under a mistake of fact, are entitled to recover the same under the cross-bill, less the amount of the second assessment, if valid.

United States v. *Barlow,* 132 U.S. 271.
Union Nat. Bank v. *McKey,* 102 Fed. Rep. 662 (C.C.A. 7th Cir.).
Ex parte James, L.R. 9 Ch. 609.

They are also entitled to recover interest on the amount due them.

Peabody v. *N.Y., N.H. & H. R.R.,* 187 Mass. 489.
Allen v. *Fairbanks,* 45 Fed. Rep. 445.

BY WAY OF RECAPITULATION.

1. The assessment of $100 a share was a valid one, which it was the duty of the comptroller to enforce, and it was beyond the power of the comptroller, the banking association being insolvent, to withdraw or annul that assessment and substitute for the enforcement thereof an ineffective scheme to restore the banking association to a solvent condition.

2. Even if a comptroller has the power to recall or suspend the enforcement of a valid assessment upon

the stock of an insolvent national banking association, that power cannot be exercised as against stockholders who have made payments on account of the assessment.

3. Even if the comptroller had authority to withdraw or annul the first assessment, the evidence is insufficient to *require* a finding that he did so.

4. If the payments in question were mere donations and were not made in reduction of liability as shareholders, they were *ultra vires* of the Savings Banks, and the banks are entitled to recover the amount thereof, or that amount less the assessment of $49 a share, if valid.

5. If the payments were not made under the agreement as above stated, they were made under the mistaken belief that the receiver accepted the same under such an agreement, and the Savings Banks are entitled to recover the amount so paid, less the assessment of $49 a share, if that assessment is valid.

6. The Savings Banks are also entitled to recover, by way of damages, interest on the amount due them.

WILLIAM H. BROOKS,
BOYD B. JONES,
Solicitors for said Savings Banks.

KORBLY, RECEIVER OF THE PYNCHON NATIONAL BANK, *v.* SPRINGFIELD INSTITUTION FOR SAVINGS ET AL.

SPRINGFIELD INSTITUTION FOR SAVINGS ET AL. *v.* KORBLY, RECEIVER OF THE PYNCHON NATIONAL BANK.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Nos. 26, 27. Argued November 8, 1917.—Decided December 10, 1917.

Under the National Banking Act the Comptroller has discretionary power to withdraw an assessment on shareholders before it is paid, or when partly paid.

Upon the evidence, *held*, that certain sums paid by savings banks to the receiver of a national bank in which they held shares were intended to be applied against their liabilities under the National Banking Act, to enforce which an assessment, made by the Comptroller, was then outstanding. A second assessment, exceeding the differences between their statutory liabilities and the amounts so paid, was void.

In determining the effect of certain payments made by the trustees of savings banks, the court here assumes, in the absence of contrary evidence, that it was the purpose of the trustees to act within their powers, and heeds the settled rule that when neither debtor nor creditor has applied payments before the controversy has arisen the courts will apply them in a manner to accomplish the ends of justice.

218 Fed. Rep. 814, affirmed.

THE cases are stated in the opinion.

Mr. Charles G. Gardner, with whom *Mr. Edwin S. Gardner* and *Mr. Ralph W. Stoddard* were on the brief, for Korbly, Receiver.

Mr. Boyd B. Jones, with whom *Mr. William H. Brooks* was on the brief, for Springfield Institution for Savings *et al.*

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases are appeals from the Circuit Court of Appeals for the First Circuit, which were heard and will be decided together.

The Pynchon National Bank, of Springfield, Massachusetts, with a capital stock of $200,000, divided into 2000 shares of $100 each, became insolvent and in June, 1901, the Comptroller of the Currency appointed a receiver to liquidate its affairs.

Upon examination there were found among its assets bonds of the American Writing Paper Company, of the par value of $577,000, which the bank had purchased at a discount, but which, at the time of the transaction we are about to consider, had so depreciated that they were worth on the market only 65 cents on the dollar.

A consideration of the condition of the bank resulted on March 18, 1902, in an assessment by the Comptroller on the shareholders of their full statutory liability of 100%, payable on the 15th day of the following May.

Thereupon a plan was devised under which it was proposed that all of the shareholders, except the three defendant Savings Banks, should purchase from the Receiver the Paper Company bonds at 95 cents on the dollar, each shareholder to purchase one bond of $1,000 for every three shares of stock owned by him. This purchase price was an advance over the market price of 30 cents on the dollar and the excess payment by each shareholder would equal 82% of the assessment which had been made by the Comptroller. Because they lacked corporate power to invest in such bonds the Savings Banks with the approval of the Comptroller and shareholders were to pay to the Receiver the required advance over the market price without purchasing their quota of the bonds.

The Comptroller cordially approved of this proposed purchase and in a letter to the Board of Directors of the

insolvent Bank, the contents of which were intended to be and were communicated to its shareholders while the plan was under consideration, he stated that it would result in a settlement of the affairs of the Bank highly satisfactory for all interests concerned and that he was satisfied that if such sale of the bonds were made the Receiver would be able to promptly pay all of the creditors in full; but that if the plan failed and it became necessary to sell the bonds on the market there would be no escape from an assessment of 100% against the shareholders.

This proposed settlement was approved by all of the shareholders, and the defendant banks made payment to the Receiver as follows: The Springfield Institution for Savings $30,360.17; the Springfield Five Cents Savings Bank, $9,820.00, and the Hampden Savings Bank, $5,319.16. For these payments the banks did not receive any consideration other than the joining of the other shareholders in the plan, together with the anticipated saving of eighteen (18) per cent. of the assessment which the Comptroller had made against them. The bonds allotted the banks were sold at the market price.

After the completion of this bond transaction, the Receiver, under instructions from the Comptroller, on July 22, 1902, wrote to the shareholders as follows:

"Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary."

The results anticipated from this action on the part of the shareholders were not realized and in order to satisfy the still unpaid debts of the bank and interest and costs of administration, the Comptroller on December 28, 1906,

made a second assessment of $49 on each share of stock. The banks refusing to pay this second assessment this suit was instituted against them in the District Court and resulted in a holding in favor of the defendants, which was affirmed by the Circuit Court of Appeals in the decision which is now under review.

It will be necessary to consider but two questions, viz: (1) Was the second assessment invalid because the Comptroller did not withdraw and had no legal authority to withdraw the first assessment? and

(2) Was it the understanding that the payments made by the Savings Banks should be applied on the assessment for their statutory liability, so that they remained liable for only 18% additional?

From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker* v. *Perry*, 184 U. S. 258; *Kennedy* v. *Gibson*, 8 Wall. 498; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; and *Bowden* v. *Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further payment is not necessary, and no form is prescribed in which such action shall be taken by him. A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the

money for any reason cannot be advantageously used. The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. All persons interested in this bond transaction were convinced, in July, 1902, that further payment than that which had been made would not be needed, and a construction should not be given to the act, its specific terms not requiring it, which would prevent such action as was taken by the Comptroller in withdrawing for the time being the unpaid portion of the first assessment. We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions.

The remaining question is: Was it the understanding that the payments to the Receiver should be applied upon the statutory liability of the Savings Banks for which assessment, then in full force, had been made by the Comptroller?

The case was tried in large part upon a stipulation as to the facts, which contains the following:

"Inasmuch as it was *ultra vires* of Savings Banks under the statutes of the Commonwealth, as the Receiver and Comptroller at the time well knew, to purchase such bonds as an investment, it was arranged with the knowledge and approval of the Comptroller and the Receiver that the Savings Banks in question, instead of purchasing their proportion of the bonds, should pay the difference between their then market value and what the National Bank paid for them."

And also this:

The checks of the banks were received "Without any agreement on the part of the Comptroller or Receiver that the payments thereby made should in whole or in part discharge the liability of the Savings Banks for or on account of the indebtedness of the National Bank and

any stock assessments, excepting so far, if at all, as such agreement or obligation may be lawfully implied from the facts stated in this stipulation and such evidence as may be introduced."

It is argued for the Receiver that if it had been understood or intended that the payments by the banks should be credited on the outstanding assessment this would very certainly have found written expression, if not elsewhere, in the receipts given and received for the payments.

It is notable that, although this bond purchase involved more than half a million dollars, the terms and purposes of it were not expressed in any writing, either between the shareholders themselves or between the Receiver and the shareholders, which indicates that the transaction, while large, seemed simple to the men of affairs engaged in it and that to their minds, at least, the implication from the payments to be made could not be doubtful. The shareholders who purchased the bonds had the prospect—how valuable it was the record does not indicate, but still a prospect—of recouping their losses through a later increase in the market value of the bonds, but the Savings Banks had no such prospect, because, not having legal authority to make such purchase their payment of what equalled 82% of the assessment against them was a naked payment, without chance of reimbursement, in whole or in part, from any source.

The evidence introduced in addition to the stipulation of facts is slight, consisting of contemporaneous entries in the corporation record and account books of the banks, and the endorsement on the checks by which payment was made. This evidence is not conclusive, but the implications from it, such as they are, are favorable to the contention of the banks.

Since no clearly definite expression is found in the record either that these payments were or were not to be applied on the shareholding liability of the Savings Banks, we are

required to decide which contention of the parties is the more reasonable and probable, having regard to all the facts and circumstances, stipulated and proved in the case.

There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees for the Savings Banks acted lawfully, within the limits of their powers, and we must also have regard to the long settled rule of law that where neither the debtor nor the creditor has applied payments before controversy has arisen the courts will make application of them in a manner to accomplish the ends of justice. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *National Bank* v. *Mechanics Bank*, 94 U. S. 437, 439. When to this we add that natural justice, as distinguished from a technical conclusion, requires that the Savings Banks be allowed credit for the payments that they have made, since thereby the creditors of the insolvent bank may get the benefit of the full statutory liability of the shareholders without a new and unanticipated obligation being imposed on the stockholding banks, we are compelled to resolve any doubt in which the record might otherwise leave us in favor of the defendants. It is impossible for us to conclude that the officials of these savings banks, trustees as they were for their depositors and stockholders, and having in mind the limitations on their powers, as the stipulation declares that they and the Receiver did have, should have made these considerable payments in such a manner as not to at all diminish the statutory liability of their banks, especially since payments not made to be applied on the assessment would be substantially unauthorized gifts, for, as we have said, the banks had no prospect, as the other stockholders had, of being reimbursed for such payments by the possible rise in the market value of the bonds.

It results that the decree of the Circuit Court of Appeals must be affirmed, but not on the ground stated in the opin-

ion of that court, and that the second assessment must be held void because excessive. This, however, without prejudice to the making of another assessment by the Comptroller upon the shareholding banks for the difference, if needed, between the amount paid and the amount of an assessment for the full statutory liability.

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.